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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 JOHN WILEY & SONS, INC.,
5 ET AL,

6 Plaintiffs,

7 v.

13 CV 816 (WHP)

8 BOOK DOG BOOKS, LLC, ET AL,

9 Defendants.

10 -----x
11 CENGAGE LEARNING, INC., ET AL,

12 Plaintiffs,

13 v.

16 CV 7123 (WHP)

14 BOOK DOG BOOKS, LLC, ET AL,

15 Defendants.

TRIAL

16 -----x

17 New York, N.Y.
18 April 4, 2018
19 8:52 a.m.

20 Before:

21 HON. WILLIAM H. PAULEY III,

22 District Judge
23 and a jury

24 APPEARANCES

25 OPPENHEIM ZEBRAK

Attorneys for Plaintiffs

BY: MATTHEW J. OPPENHEIM

JEFFREY M. GOULD

COREY M. S. MILLER

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APPEARANCES (continued)

MANDEL BHANDARI

Attorneys for Defendants

BY: EVAN MANDEL

RISHI BHANDARI

ROBERT A. GLUNT

ALSO PRESENT: JOSH DUBIN, ESQ.

RHONDA HOOPER, Paralegal

DEREK COLE, Technician

ANDREW KLEIN, Technician

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(Trial resumed; jury not present)

THE COURT: I received two letters overnight from plaintiffs' counsel.

Let's deal first with the Singh deposition excerpts.

MR. BHANDARI: Your Honor, for the Singh deposition excerpts, I think we might be able to do something that perhaps the Court would like better. And I'm sure plaintiffs won't like it, because whatever we suggest they are going to assume is bad for them and they are not going to want it.

But my suggestion is we don't necessarily need to read in the Singh transcript if we can do the following two things in our closing statement:

One, if we can, using Plaintiffs' Exhibit 341, simply show the fact that all of our books in the Chegg inventory were pulled by the plaintiffs for inspection, that came to about 444 books. And then out of those 444 books, a certain number of those books were labeled "suspect." And if we can just show those numbers directly to the jury. And I can make arguments about what our percentage of 50 or so books out of 4400, which is everything that Chegg had of our stuff in the inventory, what conclusions I think the jury should draw from that.

So it's not going to be a comparison to anybody else; we're not going to use the MBS or the -- Essig already testified to that, so I think that's something that's already in evidence in terms of the fact that we had 50 books that were

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1 considered suspect out of the 4400, so if we can just do that.

2 And then second, to do a real apples-to-apples
3 comparison of the 34 titles that were pulled for every
4 single -- the 34 priority titles that the publishers instructed
5 Chegg to pull for all books from every textbook distributor
6 that Chegg had in its inventory. We know those priority titles
7 because of DX-371; and then we are able to figure out the
8 results of those inspections based on PX-341.

9 So if we can do that apples-to-apples comparison,
10 we've printed out a chart, which is just those 34 titles and
11 what the numbers are, if we can use that in our closing, then
12 we won't need to do Singh testimony.

13 Can I show that chart to your Honor and to opposing
14 counsel?

15 THE COURT: Yes.

16 Yes, Mr. Oppenheim.

17 MR. OPPENHEIM: You can put a cat in front of a person
18 and call it a dog, it's still a cat, your Honor. That's the
19 Chegg summary. That's what's been excluded. And I think the
20 Singh testimony makes clear there were varying sample sizes, he
21 didn't know what had been done. And most importantly, under
22 the *Gupta* decision, your Honor, that we've already discussed,
23 the defendants are not allowed to put forward in concluding
24 argument evidence which no witness has described, testified, or
25 given meaning to. And that's exactly what they are trying to

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1 do, and I believe it's prohibited. We've been dealing with
2 this issue since before the trial.

3 THE COURT: Let's turn to the Singh deposition
4 transcript.

5 MR. BHANDARI: Okay. So this is not acceptable, your
6 Honor? This is not from Chegg.

7 THE COURT: I understand.

8 Plaintiffs object to it; I think that their objection
9 is well-taken.

10 But let's address the Singh transcript because, quite
11 frankly, seeing the excerpts that are in Mr. Oppenheim's
12 letter, I assume that those excerpts would be played as part of
13 the Singh transcript; correct?

14 MR. BHANDARI: Certainly, yes.

15 THE COURT: Right. So it seems to me, Mr. Oppenheim,
16 that Singh in his testimony makes the very arguments that you
17 wish to make, that the numbers are misleading.

18 MR. OPPENHEIM: If it's prejudicial and misleading in
19 the first instance, it shouldn't come in so that we have to
20 rely on the testimony of the witness that it's misleading.

21 In particular here, your Honor, what's happening in
22 this testimony is defense counsel is doing a calculation,
23 asking it in a question, and the witness is saying it's in the
24 document. The witness is not providing testimony that that's
25 the right number. If the instruction that we give every jury

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1 is correct, which is the question of the lawyer doesn't matter,
2 it's the answer, well, there is nothing in the answer; it's all
3 in the question. So it should all not be before the jury.

4 THE COURT: Look, that's great argument for the jury.
5 Quite frankly, I do not -- Singh is a Chegg witness. I don't
6 see any reason why, given Singh's testimony, that the
7 defendants should not be permitted to play the Singh deposition
8 transcript. Both sides can argue --

9 MR. OPPENHEIM: So are we -- sorry.

10 THE COURT: No, go ahead.

11 MR. OPPENHEIM: Are we then going to allow the
12 defendants to put the Chegg summary before the jury in closing?

13 THE COURT: No. No. No.

14 MR. OPPENHEIM: If it's limited to playing the
15 deposition designations, we can live with that. What I don't
16 want in closing is for that spreadsheet to be used in a way
17 they are attempting to use it, either visually or orally.

18 MR. BHANDARI: Your Honor, one thing. Unfortunately,
19 we don't have the video; we're going to have to read the
20 testimony in, but otherwise understood.

21 THE COURT: It won't be the first time we've read
22 testimony in. That's the way it used to always be done.

23 MR. BHANDARI: Right.

24 MR. OPPENHEIM: As I stand here today, this morning, I
25 haven't looked at the cross-designations on Singh. I would

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1 want to make sure that everything that's in our letter we can
2 include in the reading.

3 THE COURT: Right. That's why I asked Mr. Bhandari
4 whether everything that you've recited in your letter will be
5 included in the reading.

6 MR. BHANDARI: I'm sorry?

7 THE COURT: I want to ensure that everything that
8 Mr. Oppenheim cited in his letter relating to the Singh
9 deposition, that all of those passages are read in the course
10 of reading Singh's deposition.

11 MR. BHANDARI: Okay, your Honor. I think we just want
12 to confer with the other side in terms of making sure that
13 we've got all the --

14 THE COURT: Cross-designations.

15 MR. BHANDARI: I think it should be from 193 to 222 of
16 the Singh transcript, but let's just make sure that that covers
17 what they want as well.

18 Your Honor, the apples-to-apples comparison that I
19 just handed up we'd like to have marked for identification
20 purposes just as Defendants' Exhibit 415. I understand the
21 Court's ruling; you think that it's not a fair apples-to-apples
22 comparison, but we would just like it to be in the record.

23 THE COURT: We'll deem it marked as Defendants'
24 Exhibit 415 for identification.

25 MR. BHANDARI: Thank you.

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1 MR. OPPENHEIM: We'll need to confer on the
2 designations.

3 THE COURT: Fine.

4 MR. OPPENHEIM: There's some lawyer colloquy we should
5 probably take out.

6 MR. BHANDARI: One other thing, your Honor.

7 THE COURT: Go ahead.

8 MR. BHANDARI: We just want to, again, be clear that
9 the MBS business records that were entered into evidence at the
10 beginning are Defendants' Exhibit 287 and Defendants' Exhibit
11 288, that they are entered into evidence pursuant to the
12 902(11) certification. So there needs to be no testimony; just
13 that those records are in evidence. The certification, of
14 course, is not. We just want to be clear that DX-287 and 288
15 are in evidence so we can point the jury to those if they want
16 to look at them.

17 MR. GOULD: Before getting ahead of myself, I suppose
18 a fair question is do the defendants plan to make argument
19 based upon those documents in closing? If not, I'm happy to
20 save my piece. If so, I think I have something to add.

21 MR. BHANDARI: No, we just simply want to say that
22 there's a bunch of records in evidence, including MBS records
23 287 and 288. You're free to look at whatever it is you want,
24 if you want to satisfy yourself about what's happening with the
25 underlying evidence in this case.

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1 MR. GOULD: I take that as a representation that they
2 do not plan to argue what "bad books" means, how many books MBS
3 had in inventory from the defendants versus others, and what
4 any of that may or may not mean.

5 MR. BHANDARI: We definitely don't intend to tie any
6 of those arguments to those documents. We might say MBS had a
7 lot of books from lots of different publishers, and you can't
8 assume that the ones that came in from us, but I'm not going to
9 tie it to any documents. We are of course going to make those
10 arguments, but not tie it to 287 or 288.

11 THE COURT: All right. Why don't you take five
12 minutes to confer right now on the Singh deposition excerpts so
13 that as soon as the jury is here, we can present the evidence.

14 Generally, about how much time do you think it's going
15 to take to play the various excerpts that either defendant is
16 playing or the plaintiff is playing in rebuttal?

17 MR. BHANDARI: Just one moment, your Honor.

18 THE COURT: Are we talking an hour in time or two
19 hours in time or --

20 MR. OPPENHEIM: We have one, your Honor, which is
21 Mr. Davenport. We think that's probably 20 minutes, maybe a
22 little less. I don't know about the others. We'll work on the
23 designations issue.

24 Do you want to take up the other --

25 THE COURT: I will take up the charge -- your letter

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1 with respect to the two points on the charge. But I think I'd
2 first like to make sure you're all square on the deposition
3 designations. But if your colleagues can work on it, we can
4 talk about your second letter.

5 MR. OPPENHEIM: Designations are in more capable hands
6 than mine.

7 THE COURT: All right.

8 So let's turn to plaintiffs' counsel's second letter
9 regarding two elements of the charge.

10 First the issue that we discussed yesterday -- well,
11 let me take one issue off the table straightaway: Plaintiffs'
12 counsel's argument about confusion in counterfeit cases, I
13 think, is well-taken. I'm going to eliminate the reference to
14 confusion in the context of a counterfeit case, having looked
15 at the cases that plaintiffs cited. So we can take that issue
16 off the table.

17 But let's turn to the second issue.

18 MR. OPPENHEIM: So your Honor, this is an issue I
19 raised yesterday about making sure that the jury understands
20 that they consider -- they can consider profits in the context
21 of deterrence. And this issue arises because we limited in the
22 other factors what the consideration of profits could be.

23 So we're happy to go back to the original formulation;
24 but if we are not going to go back to the original formulation,
25 we believe that the case law makes clear that the profits

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1 should be considered in the context of deterrence. And we've
2 cited to the Court three cases, including one which basically
3 is a publisher case, which is interesting.

4 Your Honor, what we've offered in the instruction is
5 not changing the factors, but rather just adding a sentence at
6 the end of the factors. And it would go into both the
7 trademark and the copyright one that says: Well, one of these
8 factors focuses on defendants' profits from the infringement.
9 There is a separate factor concerning the deterrent effect of
10 the award on defendants and others. Under that deterrence
11 factor, you are permitted to consider defendants' total
12 profits.

13 I think that's entirely in line with all the case law
14 and it is appropriate clarification for the jury.

15 THE COURT: All right.

16 Mr. Glunt.

17 MR. GLUNT: Your Honor, a few things.

18 Firstly, we are not going to tell the jury that they
19 may not consider profits when considering deterrence; we are
20 not -- frankly, I don't expect us to tell them that they may
21 not consider very much at all. But we are not going to make an
22 argument that it is improper as a matter of law for them to
23 consider the total profits when considering deterrence.

24 My concern here though, your Honor, is it's in the
25 jury's hands to determine what the appropriate level of

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1 deterrence is and what kind of -- and what kind of information
2 is necessary in order to consider that. A jury may find that
3 the total amount of profits that the defendants earned over a
4 certain number of years is an appropriate consideration; they
5 might think revenues are an appropriate consideration; they
6 also might think the genuine benefit they received from selling
7 counterfeit books is something they should consider in awarding
8 an appropriate measure of deterrence, and that's not
9 unreasonable.

10 What I think would be unreasonable, your Honor, is for
11 the Court to weigh in on the appropriate measure of deterrence
12 by saying, Look, you need to look at this big profits number
13 when you evaluate deterrence. Look at that big number that was
14 put forward by plaintiffs; that's the number you need to be
15 considering.

16 Obviously they are allowed to consider that, your
17 Honor. But when the Court tells them and magnifies that
18 particular factor as a consideration, we think that frankly
19 it's putting the thumb a little bit on the scale. These
20 default instructions, these model instructions, were carefully
21 crafted for a reason. We don't think there's any reason to
22 tinker with them in a way which we think may prejudice the
23 defendants and may invite error.

24 As we said, we're not going to argue that something is
25 out of bounds, that they may not consider it. And I think in

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1 the absence of that, the argument that the model instructions
2 are confusing or misleading in some way is frankly not
3 well-taken. They are supported by the law. There is not
4 reason for a bespoke solution which magnifies a factor that the
5 plaintiffs wish to argue in their closing.

6 As I said yesterday, the fact that the plaintiffs
7 intend to argue something doesn't mean that argument has to be
8 specifically endorsed by the Court; and they are not precluded
9 from arguing something just because the Court didn't
10 specifically highlight it and magnify it in their instructions.

11 Moreover, there are a lot of factors that could be
12 considered in deterrence. Calling out that one factor I don't
13 think would necessarily be appropriate. We can talk about
14 over-deterrence, we can talk about impact on others. There are
15 a whole host of other factors that you could call out of
16 deterrence. We don't think it's necessary for the Court to do
17 so, particularly when they just call out the one factor which
18 the plaintiffs want to focus on.

19 MR. OPPENHEIM: Your Honor, the defendants keep
20 referring to model instructions. There are no model
21 instructions in this jurisdiction. This jurisdiction, your
22 Honor, as you know, probably handles more copyright and
23 trademark cases than any jurisdiction in the country. The case
24 law could not be more clear that one of the primary
25 consideration of deterrence is profits.

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1 I'll leave it at that, your Honor.

2 THE COURT: All right.

3 Look, in considering the parties' arguments and
4 reflecting on the colloquy that we had yesterday, I am
5 concerned about confusion in the jurors' minds.

6 Yesterday at page 2823, line 4, Mr. Bhandari said: We
7 would argue that the revenue lost by the plaintiffs can only be
8 considered in connection with the infringement. And the
9 profits the defendants earned and expenses that they save can
10 only be considered in connection with the infringement. We
11 will not say anything about that with regard to deterrence. We
12 will focus on exactly what the instruction is the way that the
13 law expects us to do.

14 That really, in my view, captures the problem here.

15 I think that the plaintiffs' proposed language is too
16 verbose. At the end of the list of factors, I'm going to add
17 one sentence as follows: In considering what amount would have
18 a deterrent effect, you may also consider defendants' total
19 profits. I think that accurately captures the law and balances
20 the argument that each party can make during the course of
21 their closings.

22 MR. GLUNT: Your Honor, may I be heard one final time
23 on this point?

24 We think that if that magnified instruction is added,
25 that the Court should also add that the jury may consider the

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1 effect that an award may have on other sellers in the
2 marketplace. As the Court knows, that's also a factor under
3 the law they may consider for deterrence. We think that it's
4 only fair to include that as well.

5 THE COURT: Any objection?

6 MR. OPPENHEIM: I think it's kind of captured already
7 in the fourth factor, but I actually don't object to that.

8 THE COURT: All right.

9 MR. OPPENHEIM: So long as that's what the defendants
10 want and feel like that balances it out, we'll accept that
11 compromise.

12 THE COURT: So the sentence will read as follows: In
13 considering what amount would have a deterrent effect, you may
14 also consider defendants' total profits and the effect the
15 award may have on other sellers in the marketplace.

16 MR. GLUNT: So your Honor, obviously we preferred it
17 as it was originally; but if the Court is inclined --

18 THE COURT: You prefer it not at all.

19 MR. GLUNT: We prefer it not at all. But if the Court
20 has already ruled on that point, then we think that the
21 additional sentence does improve it.

22 THE COURT: All right. The jury is all here.

23 Are we ready to proceed?

24 MR. MANDEL: I know your Honor has ruled, but we
25 object to the removal of the confusion language from the

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1 trademark instruction.

2 Thank you, your Honor.

3 THE COURT: All right.

4 Mr. Gould.

5 MR. GOULD: I wanted to raise two things.

6 Despite many watchful eyes --

7 THE COURT: Only one person can speak at a time.

8 Mr. Gould.

9 MR. GOULD: Thank you.

10 Despite many close reads by many people, there are
11 still a few typos in the verdict form. Happy to share those
12 with yourself or your clerk.

13 THE COURT: Right.

14 MR. GOULD: Secondly, there is a piece of the
15 instruction in number 17, copyright infringement, at lines 22
16 to 24, that discusses the concept that a copyright infringement
17 need not be intentional. 17, lines 22 to 24.

18 THE COURT: Go ahead.

19 MR. GOULD: A similar language should be added to the
20 trademark instruction because the same principle applies. We
21 thought it was in there at one point; it appears not to be in
22 there now.

23 THE COURT: All right. This is what happens late at
24 night.

25 MR. GOULD: Indeed. We're familiar.

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1 THE COURT: Any objection adding the instruction at
2 lines 22 to 24 from copyright infringement into trademark
3 infringement?

4 MR. GLUNT: Mr. Gould, can you just give me the page
5 and line?

6 THE COURT: Page 20, line 22 to 24.

7 What about timing on deposition reads? I've got 20
8 minutes or so from the plaintiff. What's the defendant got
9 approximately?

10 MR. GLUNT: Your Honor, we intend to read from
11 Mr. Tichenor's deposition. We haven't timed it out, so my
12 estimate would be maybe a half an hour.

13 THE COURT: Total?

14 MR. GLUNT: I think so; but, again, having not timed
15 it out, I apologize if it's over or under.

16 And then there's the Singh deposition. We haven't
17 timed that out either, but I expect that to be relatively
18 short.

19 MR. BHANDARI: So your Honor, just so we have clarity
20 on the closings, Defendants' Exhibit 287 and 288 are in
21 evidence; correct?

22 THE COURT: You folks are supposed to be keeping
23 records of what's in evidence.

24 MR. BHANDARI: This is the business record
25 certification, so I just want to make sure --

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1 THE COURT: We've already just discussed this. 287
2 and 288 are in evidence; correct?

3 MR. GOULD: I'm not sure that's ever been clarified.
4 Obviously we've talked about it a lot. Certainly they have a
5 decent position that the business records -- exception to
6 hearsay has been established, but we still dispute that there's
7 a foundation in the record to tell what it is to get past the
8 relevance threshold.

9 THE COURT: Are they Chegg spreadsheets or MBS
10 spreadsheets?

11 MR. GOULD: Two MBS spreadsheets.

12 MR. BHANDARI: MBS spreadsheets.

13 MR. GOULD: Mr. Hogan issue.

14 THE COURT: They are business records.

15 MR. OPPENHEIM: Right.

16 The only reason this is an issue for us is because to
17 the extent that they are going to somehow put it in front of
18 the jury, an argument on inferences about bad books, which
19 obviously would be contrary to everything that we've been
20 through 100 times, your Honor, that's the only reason we are
21 concerned about this.

22 THE COURT: Right. But he's going to walk wide around
23 that argument, right, Mr. Bhandari?

24 MR. BHANDARI: Yes, your Honor. I'm not making any
25 reference to those documents.

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1 THE COURT: They are deemed received in evidence.

2 (Defendants' Exhibits 287 and 288 received in
3 evidence)

4 MR. BHANDARI: Okay. Great.

5 And then the other thing is I wanted to just clarify
6 that for Chegg 341B -- excuse me, not Chegg, for Plaintiffs'
7 Exhibit 341B, we can reference the number of books that were
8 pulled that belong to the defendants, which is about 4400, and
9 then the number that were suspect, that is something that I can
10 reference in my closing. I just want to get full clarity on
11 that. It's from Essig's testimony; it's in evidence. We
12 should be able to argue it, but I don't want that to be
13 something that is objected to in the middle of my closing.

14 MR. OPPENHEIM: So this reference to Essig's testimony
15 is exactly what they had Mr. Singh do in the deposition.
16 Mr. Essig didn't know what the spreadsheet was. They said,
17 Well, can you look at that calculation of the spreadsheet? He
18 didn't know what it is; he had never seen it before.

19 So referencing Mr. Essig's testimony on it is the same
20 kind of misleading that this Court has addressed many, many
21 times.

22 MR. GLUNT: Your Honor, we can pull up Mr. Essig's
23 testimony, if necessary. But if I recall correctly, he was
24 shown it to refresh his recollection; and he testified --
25 perhaps ill-advised -- that it did refresh his recollection as

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1 to those numbers.

2 THE COURT: Let's bring the jury out and play the
3 videos.

4 MR. BHANDARI: Readings.

5 THE COURT: By the way, timekeeper recaps: Two hours
6 and 40 minutes for the plaintiffs, and three hours and 40
7 minutes for the defendants.

8 MR. OPPENHEIM: Do we get extra credit if we are under
9 30 at the end, your Honor?

10 THE COURT: You know what? In every timed trial,
11 there's always time left. It only happened once that -- I'll
12 tell you about it later.

13 (Jury present)

14 THE COURT: Good morning, members of the jury.

15 THE JURY: Good morning.

16 THE COURT: Members of the jury, thanks again for your
17 punctuality.

18 We were working late last night to get ready for the
19 concluding phases of the trial, and we have been working hard
20 this morning as well.

21 But we are ready to go right now. We are going to
22 continue with and conclude the taking of evidence in this case,
23 and then we'll take a very short recess, and we'll proceed to
24 closing arguments.

25 At this time, would the defendants call their next

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"Sampson"

1 witness.

2 MR. BHANDARI: Your Honor, I believe there's going to
3 be a continued reading -- there's going to be a reading now
4 from the deposition testimony of William Sampson. And it's
5 going to be done by the plaintiffs as their
6 counter-designations.

7 THE COURT: All right. Come on up.

8 MR. MILLER: May I approach?

9 THE COURT: Yes. And if you'd set the stage for the
10 jury, Mr. Miller.

11 MR. MILLER: Good morning.

12 Yesterday testimony from Mr. William Sampson's
13 deposition by video was played. Mr. Sampson's deposition
14 continued at a later date. There was no video of that second
15 deposition taken, so we're going to be reading from that
16 testimony today. And that was on October 13, 2017, and that
17 was done telephonically, so there's not a specific location
18 specified.

19 THE COURT: Okay. It was done by telephone?

20 MR. MILLER: Yes, your Honor.

21 THE COURT: Okay. And the defendant was located in
22 Farmington Hills, Michigan at the time of this deposition;
23 correct?

24 MR. MILLER: Excuse me, your Honor. It's not the
25 defendant, it's the witness --

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"Sampson"

1 THE COURT: I'm sorry. Mr. Sampson of Cengage was
2 located at Farmington Hills, Michigan when this deposition was
3 conducted; is that correct?

4 MR. MILLER: Yes, I believe that's correct, your
5 Honor.

6 THE COURT: All right. Let's proceed.

7 (Reading from the deposition of William Sampson as
8 follows)

9 "Q. Do you know whether defendants had ever asked Cengage if
10 they could purchase books from Cengage for defendants to
11 utilize for purposes of detecting counterfeits?

12 "A. Not that I'm aware of.

13 "Q. Do you believe that if defendants had asked Cengage
14 whether defendants could purchase exemplars to utilize for
15 purposes of detecting counterfeits that you would be aware of
16 such an inquiry?

17 "A. Yeah. Most of the Smyres matters or issues related to the
18 Smyres matters are funneled through either myself or Stevens or
19 Jessica, and I would have been aware of such a request.

20 "Q. Even though defendants had their accounts terminated by
21 Cengage, was there anything stopping defendants from using a
22 credit card to buy textbooks from Cengage through Cengage's
23 website?

24 "A. No.

25 "Q. Do you believe that Wirat and Aim Discovery are the only

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"Sampson"

1 two that had ever manufactured counterfeit textbooks or is it
2 the case that they are just the only two that you're aware of?

3 "A. They are the only two we are aware of; but we suspect that
4 there are many more than what we've been able to identify so
5 far.

6 "Q. Mr. Sampson, for the seven allegedly infringed Cengage
7 textbooks listed in the second amended complaint, were you from
8 memory able to tell defendants' counsel the specific test
9 purchase distributor audit and/or distributor surrender
10 pursuant to which Cengage obtained a book that it says is a
11 counterfeit sold by defendants?

12 "A. No.

13 "Q. Do you know if there are any documents that identify the
14 specific test purchase distributor audit and/or distributor
15 surrender pursuant to which Cengage obtained a book that it
16 says is a counterfeit sold by defendants?

17 "A. It's my understanding the documentation exists and was
18 provided to opposing counsel which demonstrates or shows what
19 type of source and which source the counterfeits came from.

20 "Q. Okay. So I'd like to switch to just one other area.

21 "You were asked questions about how many counterfeit
22 books Cengage alleges the defendants sold and what percentage
23 of defendants' business involves counterfeits. Do you recall
24 that?

25 "A. I do, yes.

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"Sampson"

1 "Q. Is Cengage able to identify how many counterfeit textbooks
2 defendants have sold?

3 "A. That's very difficult to do."

4 THE COURT: Excuse me.

5 "A. No, that's very difficult to do. We've only seen, you
6 know, I think what you could say is a snapshot in time. But
7 since we are not privy to Mr. Smyres' purchase and sales
8 records and, quite frankly, his inability to provide that for
9 us to look at makes it very difficult to estimate or judge how
10 many counterfeits he may sell in a given year.

11 "Q. And so is it also the case that for the same reason
12 Cengage is not able to identify the exact percentage of
13 defendants' books that involves the sale of counterfeit?

14 "A. Yes."

15 MR. MILLER: That's all, your Honor.

16 THE COURT: All right. Members of the jury, that
17 concludes reading from the deposition of William Sampson of
18 Cengage Learning.

19 Would defendants call their next witness.

20 MR. GLUNT: Yes, your Honor.

21 We would call by deposition designation Tim Tichenor.

22 THE COURT: All right. Come on up, Mr. Klein.

23 MR. GLUNT: May I approach? I have a copy for the
24 Court.

25 So your Honor, this is the deposition of Tim Tichenor

I44VWIL1

"Tichenor"

1 taken on June 3rd, 2015 in Indianapolis, Indiana.

2 THE COURT: You may proceed.

3 (Reading of deposition of Tim Tichenor as follows)

4 "Q. Tell me a little bit about your role at Tichenor Books.?

5 "A. Okay. I am the president of Tichenor College Textbook
6 Company. I took over that role in 2001, when the second
7 generation purchased from the first generation, my parents, the
8 Tichenor College Textbook Company. My role is executive
9 overseeing of the company.

10 "Tichenor College Textbook Company consists of the
11 wholesale textbook operation and one college bookstore in
12 Muncie, Indiana.

13 "Q. What other bookstores or book-related businesses are
14 associated with Tichenor?

15 "A. That's the only business. We do sell on the Internet
16 under the name Book Emporium.

17 "Q. What is the business of TCTC? I think you said it owns
18 one college bookstore; correct?

19 "A. Correct, in Muncie, Indiana.

20 "Q. And you said it's in the wholesale business; is that
21 correct?

22 "A. Yes.

23 "Q. Can you describe what you mean by that?

24 "A. So TCTC buys books from sources and sells college
25 bookstore -- excuse me, and sells to college bookstores, and

I44VWIL1

"Tichenor"

1 also sells through the Internet to consumers.

2 "Q. Did you say it sells to college bookstores?

3 "A. Correct.

4 "Q. Does it also sell to other wholesalers?

5 "A. Yes, it does, and other online entities.

6 "Q. What do you mean by that?

7 "A. People who deal directly with online consumers versus
8 having a physical college bookstore front.

9 "Q. So you approve purchases?

10 "A. Some higher level.

11 "Q. Okay. So let me just see if I understand this. That
12 whenever a seller wants to sell a high volume of books or a
13 high volume of books to TCTC, your wholesale manager will get
14 your approval on the purchase?

15 "A. Correct.

16 "Q. Okay. Where does TCTC source textbooks from?

17 "A. College bookstores, independent buyers, and other
18 wholesalers, some distributors.

19 "Q. When TCTC -- sorry. You have listed four sources for --

20 "A. I'm sorry.

21 "Q. -- TCTC?

22 "A. Internet from consumers and students, buybacks from
23 students.

24 "Q. Are there any other sources from whom TCTC obtains
25 textbooks?

I44VWIL1

"Tichenor"

1 "A. No.

2 "Q. Okay. So you listed five sources: College bookstores,
3 independent buyers, wholesalers, distributors, and consumer
4 student buybacks; is that correct?

5 "A. Yeah. Correct.

6 "Q. When TCTC sources textbooks from college bookstores, are
7 those buybacks?

8 "A. Buybacks and overstock.

9 "Q. And what is an independent buyer?

10 "A. People that go around that buy from garage sales and other
11 bookstores, professors, wherever they can.

12 "Q. So these are just individuals who purchase books and then
13 resell them back to TCTC?

14 "A. Correct.

15 "Q. When you describe that, you also -- TCTC also purchases
16 books from wholesalers, right?

17 "A. Mm-hmm, yes.

18 "Q. And who -- what -- what is a wholesaler?

19 "A. Same business that we are of buying books and selling to
20 college stores and on the Internet. An example would be Texas
21 Book Company, Missouri Book Services, Follett Wholesale.

22 "Q. Would Book Dog Books be an example of a wholesaler?

23 "A. I would consider them more of an online seller. You're
24 saying do we buy books from them? Yeah. I wouldn't consider
25 them a wholesaler though.

I44VWIL1

"Tichenor"

1 "Q. What would you consider them to be?

2 "A. An online retailer.

3 "Q. So that would be a sixth category of sources of books, an
4 online retailer?

5 "A. I guess, yeah.

6 "Q. And what is a distributor?

7 "A. I'm trying to think. Ingram Books would be a distributor.

8 "Q. Baker & Taylor?

9 "A. Baker & Taylor would be a distributor.

10 "Q. Does TCTC ever purchase books from the publishers?

11 "A. Just recently. The example is trying to compare books to
12 make sure we don't buy -- well, I take that back. The
13 bookstore purchases books from the publishers, that's in TCTC.
14 Tichenor College Textbook Company did not purchase until
15 recently. We were given sample copies to compare to make sure
16 we get legitimate copies.

17 "Q. Putting aside sample copies for a moment --

18 "A. Okay.

19 "Q. -- has TCTC historically sourced books from the publishers
20 for the purpose of resale?

21 "A. No.

22 "Q. Why not?

23 "A. The price was too high.

24 "Q. Okay. In the six categories that you listed for sources,
25 for the sources of textbooks for TCTC, what category would

I44VWIL1

"Tichenor"

1 Morena fit into?

2 "A. A distributor.

3 "Q. Okay. TCTC purchases both new books and used books; is
4 that right?

5 "A. Yes.

6 "Q. Does TC from time -- TCTC from time purchase books as new,
7 but then sell them as used?

8 "A. Yes.

9 "Q. Okay. Why does it do that?

10 "A. Because the demand for used books is much larger than new
11 books.

12 "Q. And why is the demand for used books larger than for new
13 books?

14 "A. They are less expensive.

15 "Q. So TCTC will sell books as used in order to justify
16 pricing them at lower price point than they would price new
17 books; is that correct?

18 "A. Please rephrase. I got lost there.

19 "Q. Is it fair to say that the reason that TCTC will sell a
20 new book as used is because TCTC wants to justify selling it at
21 a lower price point?

22 "A. Justify? I'm -- new books do not sell as fast. So to
23 move inventory -- because books, in our opinion, are like
24 groceries, they have an expiration date. As long as we can
25 make a profit on them, we sell some as used.

I44VWIL1

"Tichenor"

1 "Q. So here's what I don't understand: If the reason you sell
2 a new book as used is because consumers want to buy it at a
3 cheaper price, why not just sell it as a new book, but price it
4 at a lower price?

5 "A. And we have done that to consumers, bookstores. They buy
6 books basically on a pricing tier set. So a new book is sold
7 at the list price, used books are sold at 25 percent discount.
8 Bookstores that we sell to will order used only a lot of times.
9 And so for us to move that inventory, as long as we're still
10 making a profit or if we just need to return -- if we just need
11 to get a return of our money, if the book is going old edition
12 or out of print or new edition pending, we make them used
13 sometimes to sell them just to get rid of inventory.

14 "Q. Does TCTC occasionally buy new books that are priced and
15 designated as used books?

16 "A. I don't follow that at all.

17 "Q. All right. Does TCTC purchase books that, for all intents
18 and purposes, have never been used?

19 "A. Okay.

20 "Q. But in order to justify selling them at a lower price, the
21 seller has marked them as used, and so TCTC is buying them as,
22 quote/unquote, used books, even though they are new?

23 "A. Yes.

24 "Q. Does TCTC in some way distinguish between books that are
25 just priced as used, but are new, and the books that are

I44VWIL1

"Tichenor"

1 actually used and priced as used?

2 "A. No.

3 "Q. So if you look within a TCTC inventory system and you see
4 that you have 100 copies used -- 100 copies, used copies of a
5 particular textbook, you can't tell whether all 100 are
6 actually new books that have never been used, or actually used
7 books that students have marked up; is that right?

8 "A. Correct.

9 "Q. Does TCTC purchase books from overseas suppliers?

10 "A. Yes.

11 "Q. Are you familiar with the company Morena?

12 "A. Yes.

13 "Q. And do you know what the complete name for Morena is?

14 "A. I think it's Morena International Trading.

15 "Q. And for our purposes, is it acceptable if we just refer to
16 that as 'Morena'?

17 "A. Yes.

18 "Q. Does Tichenor purchase books from Morena?

19 "A. No longer.

20 "Q. When did Tichenor stop purchasing books from Morena?

21 "A. As soon as we were notified there may be counterfeit
22 books.

23 "Q. Okay. And when was that?

24 "A. February sometime, January or February, January or
25 February of '15.

I44VWIL1

"Tichenor"

1 "Q. 2015?

2 "A. Yes.

3 "Q. Do you know when TCTC first began purchasing books from
4 Morena?

5 "A. I think it was November of 2012.

6 "Q. And the books that were purchased from Morena were new
7 books?

8 "A. Yes.

9 "Q. When the books were received, were they reviewed to
10 determine whether or not they are legitimate or not?

11 "A. No.

12 "Q. Did anybody at TCTC ever reject an order of books from
13 Morena?

14 "A. No.

15 "Q. Did anybody at TCTC ever raise questions about the
16 legitimacy of the books from Morena?

17 "A. No.

18 "Q. Did anybody at TCTC ever raise questions at to whether or
19 not the books from Morena were authentic?

20 "A. No.

21 "Q. The inspection process that was done for the books that
22 came in from Morena, was that the same inspection process that
23 was used for other book suppliers?

24 "A. Yes.

25 "Q. Has any customer ever passed TCTC to provide any written

I44VWIL1

"Tichenor"

1 representations, warranties, or agreements regarding the
2 legitimacy or authenticity of the books that are being sold?

3 "A. No.

4 "Q. TCTC, I think, indicated earlier has sold a lot -- has
5 sold books to Book Dog Books, right?

6 "A. Yes.

7 "Q. And Book Dog Books has never asked TCTC to provide any
8 kind of information as to the source of the books that are
9 being purchased?

10 "A. Not to my knowledge, no.

11 "Q. And has Book Dog Books ever asked for any representations,
12 warranties, or other agreements of any sort indicating the
13 legitimacy or the authenticity of the books that TCTC is
14 selling?

15 "A. Not to my knowledge.

16 "Q. Has Book Dog Books ever asked for any representation,
17 warranty, or other affirmation of any sort from TCTC --

18 "A. No.

19 "Q. -- as to legitimacy or authenticity of the books being
20 sold?

21 "A. No.

22 "Q. And has Book Dog Books -- strike that.

23 "Has TCTC provided -- independent of any request from
24 Book Dog Books, ever provided any representation, warranty, or
25 affirmation to Book Dog Books regarding the legitimacy or

I44VWIL1

"Tichenor"

1 authenticity of the books?

2 "A. No.

3 "Q. Was Book Dog Books ever not paid on an invoice that TCTC
4 sent them?

5 "A. Not until recently.

6 "Q. What happened recently?

7 "A. They claim that some of those books may be counterfeit.
8 So at that time they had been advised not to pay us our
9 invoices.

10 "Q. And when did that occur?

11 "A. Those invoices would have been due March of 2015, so --

12 "Q. Invoices were due in March of 2015?

13 "A. Correct.

14 "Q. And was TCTC made aware of Book Dog Books' refusal to pay
15 in advance of that due date or after the due date?

16 "A. No, after the due date.

17 "Q. So sometime after March of 2015, TCTC was told by Book Dog
18 Books that they weren't going to pay for certain books?

19 "A. Yeah.

20 "Q. How did they communicate that? How did Book Dog Books
21 communicate that to TCTC?

22 "A. Our accounting person contacted them when they hadn't paid
23 yet and they asked me. So I talked to Mr. Smyres and just
24 asked him. And he said he was advised by counsel not to pay
25 these until this issue was resolved.

I44VWIL1

"Tichenor"

1 "Q. And did you have that conversation with Mr. Smyres in
2 person?

3 "A. On the phone.

4 "Q. And was that the first time you ever spoken to Mr. Smyres?

5 "A. No.

6 "Q. So you -- you know who Mr. Smyres is?

7 "A. Yes.

8 "Q. And did Mr. Smyres call you or did you call him?

9 "A. I called him. He may have called me back, but I initiated
10 the phone call.

11 "Q. And that was sometime after March of 2015?

12 "A. Yes.

13 "Q. At that point in time, you were already aware that the
14 publishers had concerns about some of these books being
15 counterfeit; correct?

16 "A. Yes.

17 "Q. So you weren't surprised by Mr. Smyres' refusal to pay?

18 "A. No.

19 "Q. Is that receivable still outstanding?

20 "A. Yes.

21 "Q. And do you know roughly how much that receivable is?

22 "A. I think it's about 80,000, 81.

23 "Q. And has -- and that receivable is associated with books
24 from Morena; is that correct?

25 "A. It's all books that we sent to them. Could be books from

I44VWIL1

"Tichenor"

1 Morena, could be books from others too.

2 "Q. Has TCTC turned to anybody else to seek payment for these
3 counterfeit books?

4 "A. The alleged counterfeit books, we even asked for payment
5 for people. People have paid us because we don't know which
6 ones are and which ones are not.

7 "Q. Let me back up.

8 "A. Okay.

9 "Q. The books that TCTC sold to Book Dog Books that are
10 counterfeit, Book Dog Books has refused to pay for them, right?

11 "A. They are refusing to pay invoices until this gets
12 resolved.

13 "Q. Until the dispute is resolved?

14 "A. Correct.

15 "Q. Okay. And what did Morena's attorney communicate to TCTC
16 regarding legitimacy of the books?

17 "A. That they think they are legitimate; that they are trying
18 their best to find invoices for those books; and that books,
19 even legitimate books, can be different between print runs and
20 copies of the books.

21 "Q. And when did counsel for Morena provide that response?

22 "A. May-ish. April or May.

23 "Q. In April or May of 2015?

24 "A. Correct.

25 "Q. And since that response, has he followed up with any other

I44VWIL1

"Tichenor"

1 invoices or other documentation to demonstrate the legitimacy
2 of the books?

3 "A. They have not as of yet.

4 "Q. Has TCTC repeated or reiterated its request for that
5 documentation?

6 "A. Yes.

7 "Q. When counsel for Morena indicated that there be
8 verifications between print runs of books, did he provide
9 any -- any details or other information to support that claim?

10 "A. No.

11 "Q. And how did TCTC respond to Morena's indication that the
12 books were legitimate or that they thought the books were
13 legitimate?

14 "A. We have continued to ask them to produce those invoices.

15 "Q. Has TCTC threatened to assert claims against Morena for
16 the value of the books?

17 "A. We have not.

18 "Q. Why not?

19 "A. We were hoping that they'll produce them in a friendly
20 atmosphere.

21 "Q. Produce what?

22 "A. Copies of the invoices that show they're legitimate books.

23 "Q. Do you believe that Morena has invoices that will show
24 that the books are legitimate?

25 "A. I don't know. I'm hopeful, but I don't know.

I44VWIL1

"Tichenor"

1 "Q. So -- so you -- let me just understand this.

2 "You think that even though the publishers'
3 representatives have inspected the books and determined that
4 the books are counterfeit by looking at the paper, the color,
5 the glue, the binding, and all of those other factors, that the
6 publishers determined the books are counterfeit, but you're
7 still hopeful that Morena will be able to produce invoices that
8 show the publishers are wrong?

9 "A. Correct. Yes.

10 "Q. Do you think that is realistic?

11 "A. I don't know. I'm not an expert on books when it comes to
12 counterfeit or not.

13 "Q. Do you believe that Morena is an expert on books when it
14 comes to counterfeits?

15 "A. No.

16 "Q. Earlier I think you indicated that you know Philip Smyres;
17 is that correct?

18 "A. Correct.

19 "Q. How long have you known Mr. Smyres?

20 "A. I met Phil maybe ten years ago, when I was over walking
21 the Ohio State campus and walked into his store.

22 "Q. In the course of the relationship with Book Dog Books, has
23 Book Dog Books ever asked TCTC where they source their books
24 from?

25 "A. When the issue came up of the counterfeit, they asked,

I44VWIL1

"Tichenor"

1 Where did you get these books? We need to know.

2 "Q. Prior to 2015?

3 "A. Not to my knowledge.

4 "Q. Has -- did BDB ever ask TCTC where it sourced its books
5 from?

6 "A. Not to my knowledge.

7 "Q. And prior to 2015, did BDB ever ask TCTC whether the books
8 it was selling were authentic or legitimate?

9 "A. Not to my knowledge.

10 "Q. Prior to 2015, did Book Dog Books ever ask TCTC to warrant
11 or represent the authenticity or legitimacy of the books it was
12 selling?

13 "A. Not to my knowledge.

14 "Q. Has since, even up to today, has Book Dog Books ever asked
15 TCTC to warrant or represent or affirm the legitimacy or
16 authenticity of the books it sold?

17 "A. Not to my knowledge.

18 "Q. Have you had any communication -- strike that.

19 "You indicated earlier that you had a telephone call
20 with Mr. Smyres regarding the Morena books; is that correct?

21 "A. Yes.

22 "Q. And you -- I think you indicated that call was roughly in
23 March of 2015; is that correct?

24 "A. Yes.

25 "Q. Have you had any subsequent conversations with Mr. Smyres?

I44VWIL1

"Tichenor"

1 "A. Yes.

2 "Q. And when were those conversations?

3 "A. One was at the National Association of College Stores. We
4 met with him and one of his associates to discuss how to
5 identify counterfeit books just because we were trying to
6 figure out how to do this and make sure we don't have this
7 problem. They were gracious and shared some of the great
8 knowledge they had for us, and that was that conversation.

9 "Q. Did they discuss with you the lawsuit that they are in?

10 "A. He said he was in a lawsuit, yes.

11 "Q. And the NACS meeting that you described, do you remember
12 roughly when this was?

13 "A. End of February, February 20th, or sometime around there.

14 "Q. So that was before you had the telephone conversation with
15 him regarding in March of 2015 or after?

16 "A. The discussion was before the phone call.

17 "Q. Okay. So the meeting was set up because -- the meeting in
18 2015 was set -- February 2015 was set up because TCTC was aware
19 that the publishers had identified certain books from Morena
20 and TCTC as counterfeit, is that right?

21 "A. They had books they suspected. They had not inspected
22 them yet.

23 "Q. And when you met with Mr. Smyres and Book Dog Books in
24 February 2015, what did they tell you about the lawsuit?

25 "A. Just that they were in the middle of one; that it has been

I44VWIL1

"Tichenor"

1 a long time and protracted, but not much more than that. I'm
2 trying to think if there was anything else. We spent most of
3 the time talking about how to identify counterfeit books.

4 "Q. So what exactly did you talk about?

5 "A. How to identify counterfeit books, because that was our
6 biggest thing. We have not had this issue. I mean, I think
7 twice now we have been asked for samples of counterfeit books
8 and we've given samples for suspected counterfeit books, and we
9 have never gotten feedback from the publishers. I think we
10 sent some to your office back in October. Haven't heard back
11 anything.

12 "And so obviously when this came up again and it was
13 talking about a large amount of books, we're trying to figure
14 out how to identify those so we don't buy them. I mean, we get
15 a lot of books in and they -- a lot of books from Morena that
16 came in publishers' boxes. They came in from the publisher,
17 publishers' markings. Everything matched up so, you know, the
18 majority of the books we got that way from Morena, so we
19 thought all the books were good.

20 "Q. But you don't have any of those boxes you had the --

21 "A. No, we do have some of those.

22 "Q. You do have boxes, boxes that --

23 "A. Books have come.

24 "Q. -- Morena has shipped to you that showed the books came
25 from a publisher?

I44VWIL1

"Tichenor"

1 "A. So Morena sent us a lot of different books from different
2 publishers. I do not have any of the boxes from the particular
3 ones on your list. But other books that your partner and
4 associates and the publisher rep came in to look at, they saw
5 the boxes, they took pictures of the boxes, they cut out labels
6 of the boxes and took them with them.

7 "Q. And what did Mr. Smyres tell you to do to identify
8 counterfeit books?

9 "A. Well, it was actually the guy that was with him. And he
10 said part of the thing you have to look at was the spine of the
11 book. If it's flat, that's sometimes a telltale sign.
12 Obviously the book is blurry, obviously signs or the coloration
13 is really, really off compared to another copy that you have
14 that's at issue. The color of the paper was different, but
15 that's about it.

16 "Q. Did he have examples of books --

17 "A. No.

18 "Q. -- for you to look at?

19 "A. No. The guy didn't invite us to come over anytime so they
20 can show you what they did. We have not done that.

21 "Q. I'm going to hand you what's been previously marked as
22 Tichenor or TIS Exhibit 3.

23 "A. Okay.

24 "Q. The email from your counsel purports to provide
25 information to the publishers in response to a request from

I44VWIL1

"Tichenor"

1 them. Is that -- is that an accurate statement as far as you
2 know?

3 "A. Yes.

4 "Q. And the first attachment appears to be a spreadsheet that
5 was, I believe, provided by TCTC; is that accurate?

6 "A. Yes.

7 "Q. Do you recognize this document?

8 "A. Yes.

9 "Q. And can you describe what this -- is this a document that
10 was created by TCTC?

11 "A. Yes.

12 "Q. And can you describe what it is?

13 "A. So basically it's a history of the Krugman title and where
14 we received them from.

15 "Q. Turning to TIS Exhibit 5, this is a -- contains some
16 emails between your counsel and -- and myself regarding these
17 counterfeit books. Have you seen this document before?

18 "A. Yes.

19 "Q. And in providing the information here, did your counsel
20 provide information that he had obtained from you?

21 "A. Yes.

22 "Q. And looking at the -- this document, the emails appear to
23 contain a number of -- of what your counsel characterized as
24 just PDFs with information. Do you see those documents?

25 "A. Yes.

I44VWIL1

"Tichenor"

1 "Q. Can you describe what those -- the attached documents are?

2 "A. So these are basically the receiving information from our
3 computer system per title that you have at the top there. So
4 you have the title. And it shows on the date who received them
5 from, the quantities received them from.

6 "Q. Okay. Just for referencing, TIS Exhibit 5 is BPSMY 026745
7 through 026775. So are the documents attached to the emails
8 here documents that were created by TCTC?

9 "A. Yes.

10 "Q. And were these documents created based on TCTC's books and
11 records?

12 "A. Yes.

13 "Q. And were they kept in the ordinary course of business?

14 "A. Yes.

15 "Q. Mr. Tichenor, I'm going to hand you what's been marked as
16 TIS Exhibit 10.

17 "A. Okay.

18 "Q. All right. So Mr. Tichenor, this is a document that was
19 created by the publishers aggregating information from the
20 spreadsheets that TCTC has produced.

21 "A. Okay.

22 "Q. Have you seen this document before?

23 "A. Last night.

24 "Q. And do you understand that this document purports to
25 determine whether or not for a certainty some of the books that

I44VWIL1

"Tichenor"

1 were sold by TCTC to Book Dog Books had to have come from
2 Morena, is that how you read this?

3 "A. Yes.

4 "Q. Okay. And if you look at the final column, do you --
5 strike that.

6 "Let's just kind of go through it.

7 "So obviously the list includes 24 titles and shows
8 the sales of each of those titles to Book Dog Books; correct?

9 "A. Yes.

10 "Q. The dates of those sales; correct?

11 "A. Yes.

12 "Q. And the quantity that TCTC had purchased from Morena prior
13 to the date of the sale to Book Dog Books, right?

14 "A. Correct.

15 "Q. And based on that, the spreadsheet seeks to determine the
16 percentage of books from Morena within TCTC's inventory before
17 the sale to Book Dog Books, right?

18 "A. Yes.

19 "Q. So for example, on the first title by Baird, B-A-I-R-D, it
20 shows that the time that five copies were sold to BDB on March
21 17th, 2014, 100 percent of the copies of that book within
22 TCTC's inventory had come from Morena; correct?

23 "A. That's what it says, yes.

24 "Q. And if we go back to Exhibit 5.

25 "A. (Witness complies)

I44VWIL1

"Tichenor"

1 "Q. And we look at the Baird title. So you see that as of --
2 well, that looking at this title, I guess, with the exception
3 of -- of one, the inventory adjustment on November 11th, 2014,
4 100 percent of the inventory for this book by Baird came from
5 Morena; isn't that right? Because everything that is not
6 Morena for this title is listed as a return.

7 "A. Yes.

8 "Q. So if you know that 100 percent of the inventory came from
9 Morena, you know that, then looking at Exhibit 10, that the
10 books that Book Dog Books received from TCTC had to have come
11 from Morena; correct?

12 "A. Yes.

13 "Q. And that's why Exhibit 10 says 'true' in the final column
14 that BDB must have received a book from Morena?

15 "A. Yes.

16 "Q. Okay. And have you had a chance to go through and to look
17 at the Exhibit 10 spreadsheet?

18 "A. No, I mean not in detail and compared to anything.

19 "Q. Do you have any reason to believe that the information
20 contained in Exhibit 10 is inaccurate or the analysis done in
21 Exhibit 10 is inaccurate?

22 "A. I don't have any reason to believe it, no, that it is. I
23 don't have any reason to believe it's not accurate.

24 "Q. Is the way that we went about analyzing this question,
25 that is, whether or not the books TCTC had sold to Book Dog

I44VWIL1

"Tichenor"

1 Books had come from Morena, is the way we went about analyzing
2 this the correct way to analyze it?

3 "A. Yes.

4 "Q. And you said, I believe, that you've been -- you had been
5 purchasing books from Morena since 2012.

6 "A. November of 2012.

7 "Q. Do you believe that from 2012 to whenever you ceased in
8 2015 buying from them, that you did buy many authentic books
9 from them?

10 "A. Oh, yes.

11 "Q. When you were speaking with Mr. Oppenheim before, he
12 pointed you, I think, to the first line.

13 "A. Correct.

14 "Q. And you accepted his proposition that if 60 copies of this
15 Baird book had been ordered before the sale to Book Dog Books,
16 and none -- and had not been bought from anyone else, that it
17 was true that any copies of those books sold to Book Dog Books
18 must have come from Morena. Did I understand --

19 "A. Correct.

20 "Q. Okay. Do you accept the proposition that every book that
21 you sold -- well, strike that.

22 "But do you also accept the proposition that all of
23 those books were necessarily counterfeits?

24 "A. No.

25 "Q. Okay. Why not?

I44VWIL1

"Tichenor"

1 "A. Through their inspection process and what we've learned so
2 far, some of the books looked so much like the other one, it's
3 almost impossible for us to tell. And I know that when they
4 inspected, they had question marks on some of them. They took
5 sample copies and went back for further research. I don't know
6 what's done at that time.

7 "And until we got reports back to say these are all
8 different -- that these are all the differences in each book
9 they point out, that's how we have gone forward and created a
10 document that says, You need to look at numerous factors to see
11 if a book is -- could be counterfeit or not.

12 "Q. Okay. Let's -- let's step back a little bit into some of
13 those comments. Let's go back to the conversation you said you
14 had with Mr. Smyres and one of his associates at a -- was it a
15 book fair?

16 "A. A book -- it's a National Association of College Stores.

17 "Q. Okay. You said you had a conversation with him about how
18 to identify counterfeits; is that right?

19 "A. Yeah, we were curious.

20 "Q. Did you ask him to have that conversation with you?

21 "A. Yeah, we scheduled a time; said we want to meet with you
22 all and ask these questions because he had volunteered at one
23 time for us to come over and talk to, and I don't recall the
24 gentleman's name who helps inspect books.

25 "Q. So was this a conversation about what processes go on when

I44VWIL1

"Tichenor"

1 books arrive at a warehouse and what to do with them?

2 "A. What to look for.

3 "Q. Okay.

4 "A. Yes.

5 "Q. What -- prior to that conversation, what was TCTC doing in
6 terms of reviewing books as books entered its warehouse?

7 "A. So when books go in, depending if they come in from a
8 bookstore, and there are a bunch of used books, we do
9 inspection to see if they look like they've got all the pages,
10 any water damage, those types of things. Books that come in
11 new in nature, we looked at them from the standpoint of did
12 they look like they were good copies, they -- because
13 previously we have seen people say -- and we've seen our
14 bookstores when they get them in. We'll get copies that are
15 glaringly different, so much so that you can tell a book has
16 come in that doesn't even look -- it looks like somebody's
17 tried to counterfeit it. You know, paper much larger and
18 looks -- looks like it's been photocopied. Obviously we return
19 those or destroy them.

20 Some of the other things we've done is when they come
21 in boxes from the publishers, obviously we track. So if it's
22 sold from Ohio to Australia to -- back into another Australian
23 thing back to us and we can track that on the labels of the
24 boxes, I mean we just want to make sure they look like they
25 were legitimate books. I don't -- it's very, very hard for us

I44VWIL1

"Tichenor"

1 to tell. I mean I can -- conversations happen during the
2 inspection, even with the inspectors, of which one was the
3 counterfeit and which one was not. You know, when I hear that,
4 well, these are all the experts, how am I supposed to be able
5 to tell? That's what our staff said, the same thing. Quote,
6 you're asking us to do something the inspector couldn't even
7 do. End quote.

8 "Q. So from your comments, it sounds like other than looking
9 for damaged books or did you receive all the copies you were
10 supposed to receive, your company was already engaging in at
11 least some effort to identify possibly counterfeit books; is
12 that right?

13 "A. I mean we always have looked because there used to be what
14 we thought was a glaring difference. This last set, with what
15 the publisher inspection showed us, it's very difficult.

16 (Continued on next page)

17
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I44MWIL2

"Tichenor"

1 "Q. So when you were talking before about having the
2 conversation with Mr. Smyres and asking him what -- how Book
3 Dog Books handles things and you said something about, this has
4 never been an issue before in terms of trying to identify
5 counterfeits, and maybe I misunderstood?

6 "A. We have never had a big issue with it before. There has
7 been two other occasions where we have been asked to furnish
8 books to the publisher, one time with homeland security 12
9 years ago, and they came in and seized \$17,000 worth of books,
10 and I asked them, "Can you guys tell the difference?" They
11 said no. And I said, "Well, OK."

12 So they took the books, never paid for them or
13 answered. We never got anything. They just -- they just said
14 they were bad, so I wrote off \$17,000.

15 This last, I think it was October or September we were
16 asked by someone in your offices to send a couple of copies of
17 two different books because we sent them and we had not heard
18 anything back, and I think Susan was the person we sent those
19 to in this situation here.

20 "Q. Is this sort of the first time in recent memory that you
21 really had to deal with an allegation of buying counterfeits?

22 "A. Yes.

23 "Q. So is that what you meant by this has never -- maybe never
24 wasn't the right word -- been an issue before?

25 "A. It has not been an issue for us before. Two isolated

I44MWIL2

"Tichenor"

1 cases that we have never heard back from other than they took
2 some of the books, and we are still waiting on a reply back on
3 the other two titles that we sent back in October.

4 "Q. And you said you've been in business since 1962?

5 "A. Yes.

6 "Q. You talked earlier about making contact with Morena or
7 perhaps it was your counsel contacted their counsel. I am not
8 sure which it was.

9 "A. So we originally contacted Amar Awad about this and then
10 Mazenal-Ali via e-mail to ask for proof of invoices from
11 publishers on these titles.

12 "Q. Did you tell them the books stood accused of being
13 counterfeits?

14 "A. Yes.

15 "Q. And what was the response to that accusation?

16 "A. They said -- they didn't believe they are counterfeit, and
17 they would do everything they could to try to get the copies of
18 invoices.

19 "Q. And at the time were you talking with them about several
20 different titles or one particular title?

21 "A. Well, the first thing we told them, we told them
22 everything, and then after the inspection we said it looks like
23 it's only a group of these publishers, Pearson, Cengage, and I
24 think maybe Wiley, I think. And we asked for invoices and
25 copies of the invoices for them. After our first initial

I44MWIL2

"Tichenor"

1 couple of e-mails went out, we didn't get much of a reply, and
2 then their attorneys contacted us, and there have been
3 communications with our attorney asking for the same
4 information.

5 "Q. OK. Is TCTC in the business of purchasing counterfeit
6 books?

7 "A. No.

8 "Q. Would it purposefully set out to purchase counterfeit
9 books?

10 "A. No.

11 "Q. Not even to save money?

12 "A. No.

13 "Q. Does it believe that it has -- that it accidentally buys
14 them on a regular basis?

15 "A. I would say counterfeit books get into inventory every
16 once in a while because obviously we could not tell the one we
17 received might be counterfeit. I mean, they are getting so
18 good, so we try our best to inspect them. But if you get a
19 shipment of a thousand different titles from a different
20 book -- from different books and you have one copy, we can't go
21 through each copy to inspect each and every copy to see, open
22 up the book, look at it numerous times. But it's just one
23 copy.

24 "Q. Referencing back to the Krugman title --

25 "A. OK.

I44MWIL2

"Tichenor"

1 "Q. -- because it's an easy example here. So your normal
2 process relies upon receiving that shipment of -- shipments of
3 Krugman from Morena would be to do some sort of inspection, is
4 that right?

5 "A. Yeah. Look at the book, I mean the stacks of books. OK.
6 Is that the title we ordered? ISBN matches the quantity we
7 ordered. It's not damaged books. It's fine, yes.

8 "Q. And I take it because you put those books in an inventory
9 for sale, you did not find them to be glaringly suspect
10 unauthentic?

11 "A. Correct. We did not think that.

12 "Q. So at the time you sold them to Book Dog Books, you did
13 not believe them to be counterfeits, is that right?

14 "A. Correct.

15 "Q. In your other answers it sounds like you still have your
16 suspicions today that they might not be counterfeit?

17 "A. I'm not an expert. I can tell you by looking at the
18 reports we received that they were thorough looking at
19 different things. I still can sometimes pick up a regular copy
20 and a new copy and try to see the differences they pointed out,
21 and I have a very hard time identifying those.

22 "Q. How long was your discussion with Mr. Smyres and his
23 colleague at the book convention?

24 "A. Maybe 30 minutes or 20. I don't know.

25 "Q. Did they give you any documentation?

I44MWIL2

"Tichenor"

1 "A. No.

2 "Q. What impression did you have in terms of, you know, how
3 well they had themselves set up to conduct inspections?

4 "A. They did more than we did."

5 "Q. He is going to object occasionally, but you still need to
6 answer.

7 "A. OK. They knew more than we did at that time. That's why
8 we were asking questions, just to find out. My impression is,
9 they obviously didn't want to get counterfeit books from us, no
10 more than we would want to sell counterfeit books, and we said,
11 "At this time we still don't know what might be counterfeit,
12 what might not be counterfeit. We are just trying to figure
13 out what we can do to make sure it doesn't happen in the
14 future." And that's what the conversation was really about.

15 "Q. And this -- indeed this whole situation has caused you, at
16 least temporarily, to lose Book Dog Books' business, hasn't it?

17 "A. Yes.

18 "Q. Well, if you can't remember, you can't remember. Earlier
19 you were talking about the past when -- when the books are
20 incoming at the warehouse and you are reviewing them, that
21 there have been instances where you had suspected books of
22 being counterfeit, is that right?

23 "A. Very few.

24 "Q. And what would you do with those books if a determination
25 was made?

I44MWIL2

"Tichenor"

1 "A. So either tell the person that we weren't going to buy it
2 and return the book to them, or we were going to destroy the
3 book.

4 "Q. So you've done both destruction and returning of books?

5 "A. Yes.

6 "Q. So, for example, you would turn in Exhibit 5 to the
7 Krugman title, the page I had -- the page I had before.

8 "A. Page 026759.

9 "Q. Exactly. Am I reading the TCTC chart correctly if I say
10 that only three used copies of the Krugman title were bought
11 from sources other than Morena?

12 "A. Used copies you said?

13 "Q. Correct.

14 "A. Correct, yes.

15 "Q. None of the new -- there was not a single new copy source
16 from anybody other than Morena, correct?

17 "A. Correct.

18 "Q. So if I then look at TIS Exhibit 6 and I turn to page 7 of
19 that exhibit --

20 "A. (Witness complies.)

21 "Q. -- and I look about two-thirds of the way down at the
22 Krugman title --

23 "A. OK.

24 "Q. -- it indicates that TCTC sold nine new copies of the
25 Krugman title to Book Dog Books on or around December of 2014,

I44MWIL2

"Tichenor"

1 right?

2 "A. Correct.

3 "Q. OK. Based on --

4 "A. December 12.

5 "Q. December 12 of 2014. Based on the purchase data, you
6 would have to conclude that those new copies came from Morena.
7 The new copies that were sold to Book Dog Books came from
8 Morena, correct?

9 "A. Based on the timing.

10 "Q. Well --

11 "A. Yes.

12 "Q. So you know for certainty that the copies that were sold
13 in December of 2014 to Book Dog Books had to have come from
14 Morena, right?

15 "A. Correct.

16 "Q. And we can similarly go through and identify all of the
17 purchases of new books, new Krugman books by Book Dog Books,
18 and come to the same conclusion, right, including, for
19 instance, the one on Tichenor, page 12, the four copies
20 purchased in December 22, 2014, so on and so forth, correct?

21 "A. What page did you say?

22 "Q. TICH 12.

23 "A. OK, yes.

24 "Q. If they bought new copies.

25 "A. Yes. Because that's the only place we got new copies

I44MWIL2

"Tichenor"

1 from.

2 "Q. OK. And we can go through and do the same kind of
3 analysis for each and every title, correct?

4 "A. Correct.

5 "Q. And that analysis is the analysis that is contained on
6 Exhibit 10, correct?

7 "A. I believe it to be.

8 "Q. Which is why, if you look at the Krugman title, which is
9 title 14 on Exhibit 10, under a column that says, BDB must
10 receive a book from Morena, it says true to all three purchases
11 of books of the Krugman title from TCTC.

12 "A. Yes, I see that.

13 "Q. You say that you see that, but you agree, right?

14 "A. Yes. I can see that we only purchased new titles from
15 Morena on Krugman and we sold new titles. That's where they
16 came from."

17 MR. GLUNT: That concludes the deposition of Tim
18 Tichenor, your Honor.

19 THE COURT: Would the defendants call their next
20 witness.

21 MR. BHANDARI: Your Honor, we are just finishing up
22 one thing. We haven't asked the plaintiff if it's possible for
23 them to do their designation for Mr. Davenport, and then we
24 will do the final designation after that.

25 MR. OPPENHEIM: Sorry, your Honor, we weren't quite

I44MWIL2

"Davenport"

1 ready for that, but now we are.

2 MR. MILLER: May I approach, your Honor.

3 THE COURT: Yes.

4 MR. MILLER: Now we are going to present the
5 deposition testimony of Mark Charles Davenport taken in
6 Columbus, Ohio on June 18, 2014:

7 "Q. OK. And so why is it that you don't use the company
8 e-mail address?

9 "A. I'm not -- I wasn't comfortable with the format. I
10 just -- I like mine better, and I didn't even have an e-mail
11 address until two years ago."

12 MR. OPPENHEIM: I'm sorry, your Honor. May I
13 interrupt. It may be useful to tell the jury that this is
14 somebody who works for the defendants because I'm not sure we
15 introduced that issue yet.

16 THE COURT: Right.

17 I take it, Mr. Bhandari, that Mark Charles Davenport
18 is employed or was employed by Book Dog?

19 MR. BHANDARI: Yes and yes, your Honor.

20 THE COURT: Let's go.

21 MR. MILLER: Start that again:

22 "Q. OK. And so why is it that you don't use the company
23 e-mail address?

24 "A. I'm not -- I wasn't comfortable with the format. I
25 just -- I like mine better, and I didn't even have an e-mail

I44MWIL2

"Davenport"

1 address until two years ago.

2 "Q. So until 2012?

3 "A. Yeah, that I used. I just didn't use it because I didn't
4 like it. I may have had one. They changed them all two years
5 ago, but before that I never used it.

6 "Q. When were you first employed by one of Mr. Smyres'
7 businesses?

8 "A. 2008.

9 "Q. And is the SPC -- SBC e-mail address you described the
10 e-mail address you've used for that entire period of time?

11 "A. Yes.

12 "Q. And how far back do you maintain copies of e-mails you
13 have received and sent on that address?

14 "A. In general, I believe most -- I leave them.

15 "Q. And do you retain those e-mails on your own computer or
16 are they retained on a server somewhere outside of your
17 computer?

18 "A. They are obtained on a server at Yahoo and at work on Book
19 Dog Books.

20 "Q. So Book Dog Books retains copies of all your e-mails?

21 "A. Well, my e-mail account is there. I really don't know
22 exactly how that works.

23 "Q. Is there a reason that your e-mail was not searched prior
24 to last week?

25 "A. I didn't really need to.

I44MWIL2

"Davenport"

1 "Q. When did you first become aware of this lawsuit?

2 "A. Probably about six months ago.

3 "Q. So in roughly January of 2014 or December of 2013?

4 "A. I don't know when I became aware of it.

5 "Q. Were you aware that Book Dog Books filed a lawsuit in
6 Columbus, Ohio against Pearson Education and Cengage Learning
7 in December of 2012?

8 "A. No.

9 "Q. Prior to your employment in 2008 with Book Dog Books or
10 Textbooks R Us, had you worked in the book business?

11 "A. No.

12 "Q. What had you done in terms of employment prior to 2008?

13 "A. I had built homes with Showcraft Fine Homes.

14 "Q. That's an entity that is owned by Mr. Smyres, is that
15 correct?

16 "A. We are partners.

17 "Q. You are partners with Mr. Smyres in that company?

18 "A. Yes.

19 "Q. Can you please describe your educational background.

20 "A. I have an industrial and systems engineering degree from
21 Ohio State.

22 "Q. When did you receive that degree?

23 "A. 1989.

24 "Q. And how were you employed after you received that degree?

25 "A. Self-employed.

I44MWIL2

"Davenport"

1 "Q. And in what company was that?

2 "A. Davenport Contracting.

3 "Q. How did you meet Mr. Smyres?

4 "A. We owned properties across the street from each other on
5 campus at OSU.

6 "Q. And can you describe how you first got into business with
7 Mr. Smyres in Showcraft Fine Homes?

8 "A. He had worked on a house, building a house with his exwife
9 and wanted to build homes, and I was doing contracting work and
10 I thought that I could -- that we could do it together and do
11 it and have a small business building homes.

12 "Q. And why in 2008 did you decide to leave the business of
13 building homes?

14 "A. Because the home building industry collapsed.

15 "Q. Was it at that point that Mr. Smyres hired you to work for
16 one of his companies?

17 "A. Yes.

18 "Q. Are you still employed by Mr. Smyres?

19 "A. Yes.

20 "Q. In the book business?

21 "A. Yes.

22 "Q. Are you also employed as a contractor?

23 "A. Yes.

24 "Q. And by whom?

25 "A. Book Dog Books.

I44MWIL2

"Davenport"

1 "Q. Are you still in the home building business?

2 "A. No.

3 "Q. Does Showcraft Fine Homes still exist?

4 "A. Yes.

5 "Q. And is that still business building homes?

6 "A. No.

7 "Q. What is that business doing?

8 "A. Renting a few homes.

9 "Q. Are you responsible for managing that company?

10 "A. Yes.

11 "Q. When in 2008 were you retained by Textbooks R Us or Book
12 Dog Books?

13 "A. May, June, summer.

14 "Q. At the time you were retained were you made aware of the
15 fact that there was a lawsuit brought by the publishers in 2007
16 against Mr. Smyres and Textbooks R Us for copyright
17 infringement?

18 "A. No.

19 "Q. Are you aware now that there was a lawsuit in 2007 for
20 copyright and trademark infringement against Mr. Smyres?

21 "A. Yes.

22 "Q. When did you become aware of that 2007 lawsuit?

23 "A. I don't recall.

24 "Q. Was it shortly after you were hired? Was it within the
25 last year? Do you have any sense of the time frame?

I44MWIL2

"Davenport"

1 "A. I think -- wait a minute. I do have a notion there was an
2 issue earlier. Yeah. Probably 2008. I need to change my
3 answer.

4 "Q. OK. Around the time that you were hired you were aware
5 that there was a lawsuit?

6 "A. Yeah.

7 "Q. Brought by the publishers for copyright infringement?

8 "A. Yes.

9 "Q. Do you recall now how you became aware of that?

10 "A. Yes. He asked me to get rid of some books.

11 "Q. He is Mr. Smyres?

12 "A. Yes.

13 "Q. So in 2008, Mr. Smyres asked you to get rid of some books?

14 "A. Yes.

15 "Q. What do you mean by, get rid of some books?

16 "A. Dispose of books that they needed to be disposed of.

17 "Q. Can you describe why you were doing that?

18 "A. It was time to get rid of the books. They had what they
19 called bad books. Gosh, that was so fuzzy I -- you know, think
20 back to that time. They -- he had an issue with them and
21 needed to get rid of them, you know. They didn't know what
22 they were, so he just said to get rid of them.

23 "Q. Mr. Smyres, in 2008, asked you to get rid of bad books or
24 counterfeit books, is that right?

25 "A. They weren't -- I don't think they knew what they were,

I44MWIL2

"Davenport"

1 you know.

2 "Q. You say they. Who is they?

3 "A. The company, Phil.

4 "Q. Do you have any dealings with anybody other than
5 Mr. Smyres with respect to the destruction of books in 2008?

6 "A. No.

7 "Q. So why did Mr. Smyres ask you to get rid of these bad
8 books?

9 "A. At the time I had space in my barn and a forklift, a
10 little bobcat with a skid loader.

11 "Q. So explain to me why that was, why that was relevant.

12 "A. Forks that could handle materials, you know. They had
13 four pallets that needed thrown away.

14 "Q. And where were the pallets of books when you were asked to
15 get rid of them?

16 "A. In my barn.

17 "Q. Why were they in your barn?

18 "A. So they needed to get them out of the warehouse.

19 "Q. OK. So let's back up. How did the bad books get into
20 your barn?

21 "A. They brought them out on the little Textbooks R Us truck.

22 "Q. Do you recall roughly when that was?

23 "A. 2008.

24 "Q. Who is they?

25 "A. I think I used the wrong term they.

I44MWIL2

"Davenport"

1 "Q. Who was driving the truck?

2 "A. Gosh. That was so long ago. I think I did. I don't
3 really remember, you know. The books were there. I did drive
4 that truck sometimes. I hadn't been thinking, you know.

5 "Q. Take your time.

6 "A. What's the question?

7 "Q. I'm trying to understand how and why the bad books got
8 from the warehouse to your barn.

9 "A. On a truck that I don't remember who that -- golly. Maybe
10 it was Phil, you know. I can't think of.

11 "Q. Was Britt Wood involved at all?

12 "A. I have heard of Britt. I know Britt or I used to know him
13 when he worked there.

14 "Q. Do you know why Mr. Smyres wanted to move the bad books
15 from the warehouse to your barn?

16 "A. The case -- I thought the case -- well, gosh, that was so
17 long ago. They needed to get rid of them and get them out of
18 there so they wouldn't go online.

19 "Q. Why not just take them directly to the dump or to a
20 recycler?

21 "A. I think there was some question as to whether they were
22 good or not, and they needed to examine their sources.

23 "Q. Do you know who was doing that?

24 "A. No.

25 "Q. How long were the books in your barn before you destroyed

I44MWIL2

"Davenport"

1 them in 2008?

2 "A. I don't remember that.

3 "Q. You recall destroying them, the books?

4 "A. Yes.

5 "Q. And how did you go about destroying these bad books in the
6 2008 time frame?

7 "A. We went to the same landfill as the last little bit.

8 "Q. And is that the landfill in Grove City?

9 "A. Yes.

10 "Q. So -- and do you recall who helped you to dump the books
11 at the landfill at 2008?

12 "A. Yeah. My sons.

13 "Q. How many sons do you have?

14 "A. I have two.

15 "Q. How old are they now? Let's try that.

16 "A. 24 and 16.

17 "Q. So at the time they were roughly 18 and 10?

18 "A. Yeah.

19 "Q. Does that sound right? And they helped you unload the
20 books from a truck?

21 "A. Yes.

22 "Q. OK. And did you say that there were roughly four pallets
23 of books in 2008?

24 "A. Yes.

25 "Q. And do you recall what the weather was like when you

I44MWIL2

"Davenport"

1 unloaded the books? Was it cold? Was it hot?

2 "A. It was hot and I don't know that it was 2008. It could
3 have been 2009.

4 "Q. OK. So the books were moved into your barn in 2008 is
5 what you recall?

6 "A. I really don't know that one.

7 "Q. You recall whether or not you may have had any e-mails
8 with Mr. Smyres regarding this?

9 "A. Nothing came up about it when I searched. I don't recall
10 an e-mail.

11 "Q. And who told you to destroy the books in 2008 or 2009?

12 "A. Phil did.

13 "Q. And did he tell you why?

14 "A. They needed to be rid of.

15 "Q. How did you go about destroying them?

16 "A. I put them in the landfill and watched the bulldozer run
17 over them.

18 "Q. And can you describe your current job responsibilities?

19 "A. I work with K to 12 schools. I go to schools and either
20 pick up books or introduce ourselves and introduce our company
21 to them so that we can buy and sell textbooks to schools.

22 "Q. What do you mean you pick up books?

23 "A. When they are disposing of books, we haul their old books
24 away or what we purchased from them.

25 "Q. What do you do with the old books that you purchase from

I44MWIL2

"Davenport"

1 them?

2 "A. Bring them into the warehouse and let them receive them
3 and determine what to sell.

4 "Q. And does Book Dog Books attempt to resell the old books?

5 "A. Yes.

6 "Q. Can you describe what that involves, generally?

7 "A. Glueing a spine, putting on a sticker, maybe, maybe
8 disposing of it if they don't. If they are not sold or
9 sellable, I should say.

10 "Q. Has Book Dog Books ever put a new cover on an old
11 textbook?

12 "A. No.

13 "Q. Have you been in the Book Dog Books warehouse?

14 "A. Yes.

15 "Q. Do you know what the size of the Book Dog Books warehouse
16 is, roughly?

17 "A. Yes.

18 "Q. What is it?

19 "A. 40,000 square feet.

20 "Q. Does the warehouse have racks on which pallets can be
21 placed?

22 "A. Yes.

23 "Q. Racks or shelving?

24 "A. Yes.

25 "Q. Which would you call it, pallet racking?

I44MWIL2

"Davenport"

1 "A. That's what I call it, yes.

2 "Q. Have you ever received any training on how to identify a
3 counterfeit book?

4 "A. I haven't received training. I have been part of an
5 informal discussion about it.

6 "Q. When was that?

7 "A. A year ago.

8 "Q. 2013?

9 "A. Roughly, yes.

10 "Q. That was the first time you've had any dialogue with folks
11 at Book Dog Books about how to identify counterfeit books?

12 "A. Yes.

13 "Q. And who kind of conducted or set up that informal
14 discussion?

15 "A. Kevin Doenges.

16 "Q. Can you describe generally what he explained to you.

17 "A. We just looked at a few examples of counterfeits, and he
18 showed, you know, the binding on one versus the binding on the
19 other, and one of them had different quality paper, you know, I
20 guess, compared the different qualities of paper.

21 "Q. Was there any discussion about counterfeit books other
22 than how to identify them?

23 "A. Yes. They were trying to avoid getting them out in
24 circulation.

25 "Q. You're aware that it's illegal to distribute counterfeit

I44MWIL2

"Davenport"

1 books?

2 "A. Yes.

3 "Q. And presumably you were aware of that even before the 2013
4 meeting?

5 "A. Yes.

6 "Q. In 2008 or 2009, when you destroyed the bad books, did you
7 take a look at them to see what they looked like?

8 "A. Yes. I don't really remember what they looked like. They
9 were just books and it didn't seem -- and I don't you know -- I
10 just wanted to be rid of them.

11 "Q. So after 2008, 2009, did there come another instance where
12 counterfeit books were stored in your barn?

13 "A. Yes.

14 "Q. When was that next instance?

15 "A. The latter part of or the early part of 2011 there was
16 books there.

17 "Q. So can you describe for me the circumstances by which
18 books were sent to your barn in 2011?

19 "A. I took them out of the warehouse and brought them to my
20 barn.

21 "Q. Can you describe why you did that.

22 "A. They were getting rid of them so they wouldn't be put
23 online, you know. There was some concern about them getting
24 online and getting them sold.

25 "Q. Who is they?

I44MWIL2

"Davenport"

1 "A. Kevin, Phil. I don't think -- people in the office, you
2 know, the company, everybody.

3 "Q. What books were these that you took to the barn?

4 "A. I don't know.

5 "Q. Who had gathered the books?

6 "A. Kevin.

7 "Q. And who asked you to take the books to your barn?

8 "A. Phil.

9 "Q. And did you do that by e-mail?

10 "A. No.

11 "Q. Can you describe for me what he told you when he asked you
12 to take them to the barn?

13 "A. We have books of unknown origin, and we want to get them
14 out of here before we accidentally get -- you know, get them
15 online.

16 "Q. He didn't use the phrase "unknown origin," did he?

17 "A. No. Probably questionable, I think is what they talk, you
18 know, the term they use.

19 "Q. They call them questionable books?

20 "A. Yes.

21 "Q. They don't say bad books, they don't say counterfeit
22 books; they call them questionable books?

23 "A. Yeah, exactly. Because they don't know if they are
24 counterfeit for not.

25 "Q. OK. I'm sorry. Can you describe for me again what he

I44MWIL2

"Davenport"

1 told you and when he told you.

2 "A. I don't know exactly when it was, but it was the early
3 part of 2011, Aprilish to, you know. Kevin actually I believe
4 told me, you know. I didn't really get it from Phil. It was
5 just the -- Phil said get the books out of here.

6 "Q. OK. Were you already in the warehouse when Kevin talked
7 to you or were you already there?

8 "A. Yes.

9 "Q. You were already in the warehouse?

10 "A. Can you get rid of these.

11 "Q. That was roughly in April of 2011?

12 "A. Yes.

13 "Q. What does Kevin told you?

14 "A. Get rid of them. We need to put these books -- get them
15 out of here so we don't get them online.

16 "Q. Does he tell you that Phil told him to ask you to get them
17 out of here?

18 "A. Yes.

19 "Q. I know it's a little awkward.

20 "A. Yes.

21 "Q. The process is, it's important that I finish my question
22 and I let you answer the question.

23 Do you know why Kevin Doenges asked you to take the
24 questionable books?

25 "A. Because I move a lot of books with schools and I have a

I44MWIL2

"Davenport"

1 truck capable of, you know, handling a pallet of books.

2 "Q. And so --

3 "A. And it was going to my warehouse or my barn garage.

4 "Q. Why were the books going to your barn garage?

5 "A. I think because there was no other place to put them.

6 "Q. Why not just destroy them?

7 "A. I thought they were trying to determine what they were
8 because they could have been good books.

9 "Q. So there was still an ongoing investigation as to the
10 legitimacy of the books?

11 "A. That was my -- that's why they were questionable.

12 "Q. And you said that this was in roughly April of 2011, you
13 think?

14 "A. Yes.

15 "Q. And do you recall what the quantity of the books were
16 there?

17 "A. It was a pallet of about 20 boxes.

18 "Q. And how many books per box, roughly, would you think?

19 "A. Fifteen.

20 "Q. Do you recall anybody keeping an inventory or a list of
21 what the books were?

22 "A. No.

23 "Q. Well, how were they investigating whether or not the books
24 were illegitimate if they didn't even have a list of what the
25 books were?

I44MWIL2

"Davenport"

1 "A. Somebody may have had a list. I suspect somebody does.

2 "Q. You think somebody does. You weren't asked to create a
3 list of the books that were taken out.

4 "A. No.

5 "Q. Were the boxes closed boxes?

6 "A. Yes.

7 "Q. At any time did you look at the content of the boxes?

8 "A. Yes.

9 "Q. You recall when you saw what you looked at them?

10 "A. Normal-looking books. They didn't seem bad.

11 "Q. They didn't seem as though they were counterfeit to you?

12 "A. I didn't examine them that well.

13 "Q. Were they higher education books?

14 "A. Yes.

15 "Q. Do you recall what the subject of the books were?

16 "A. No.

17 "Q. You don't remember any of them?

18 "A. No.

19 "Q. Do you remember any of the authors' names?

20 "A. No.

21 "Q. Do you remember any of the publishers' names?

22 "A. No.

23 "Q. Do you remember seeing any trademarks on the book that
24 would have indicated who the publishers were?

25 "A. No. I didn't look at them that closely.

I44MWIL2

"Davenport"

1 "Q. You recall how many copies of each title were there --
2 strike that. Were there multiple copies of each title within
3 the boxes?

4 "A. Yes.

5 "Q. It wasn't all just one-off books. There were multiple
6 copies of books?

7 "A. There were -- yes. There were multiple copies.

8 "Q. Do you remember whether there were lots of copies of each
9 title or only a couple of each title? Do you have a sense of
10 that?

11 "A. It seemed like there were batches of titles.

12 "Q. Do you know who was doing the follow-up investigation to
13 determine whether the books were legitimate?

14 "A. No.

15 "Q. Were the books and the boxes organized in any particular
16 way?

17 "A. No. I mean --

18 "Q. Sorry. Go ahead.

19 "A. I don't think so. I didn't try to figure out a pattern.

20 "Q. So how did you go about transferring them to your barn?

21 "A. My truck.

22 "Q. How big is your barn?

23 "A. Well, the barn garage is like 10 by 20.

24 "Q. And at the time you unload the questionable books, you
25 already had some K through 12 books in the barn, right?

I44MWIL2

"Davenport"

1 "A. Right.

2 "Q. Were the boxes with the questionable books sealed?

3 "A. Yes.

4 "Q. The boxes didn't have any writing on them?

5 "A. I don't recall.

6 "Q. Were you involved in any way in deciding what books were
7 being stored as questionable?

8 "A. No.

9 "Q. Were you told what you were supposed to do with these
10 questionable books other than store them in your barn?

11 "A. Wait for further instructions.

12 "Q. That's what Mr. Doenges told you?

13 "A. Yes.

14 "Q. Did you ever speak directly to Mr. Smyres about these
15 books?

16 "A. I must have.

17 "Q. Do you recall?

18 "A. Yeah.

19 "Q. When?

20 "A. Probably around this time.

21 "Q. And do you recall roughly what you discussed?

22 "A. Yeah. The books. What was -- you know. Why they were
23 there, you know, that they were questionable books.

24 "Q. And did you understand that these were very similar to the
25 books that you had been asked to store and destroy in 2008,

I44MWIL2

"Davenport"

1 2009?

2 "A. Right.

3 "Q. Did Mr. Smyres tell you anything else about these books?

4 "A. No.

5 "Q. Did you discuss with him the recent problem at the time in
6 2011 of counterfeit books?

7 "A. Just that they were trying to prevent it.

8 "Q. Did Mr. Smyres discuss with you that they recently found
9 counterfeit books within the inventory?

10 "A. Yes.

11 "Q. What did he say along those lines?

12 "A. That they are occasionally showing up and they are trying
13 to, you know, pull them out and get rid of them.

14 "Q. Did he discuss with you in any way that there were
15 particular suppliers that were providing these counterfeit
16 books?

17 "A. That they were bad suppliers, yes.

18 "Q. Does the name Best Books World ring a bell to you?

19 "A. No.

20 "Q. Does the name Blackerby ring a bell to you?

21 "A. No.

22 "Q. Does the name Life Everest or Book's Value ring a bell to
23 you?

24 "A. No.

25 "Q. Mr. Smyres never discussed any of those suppliers with

I44MWIL2

"Davenport"

1 you?

2 "A. No.

3 "Q. Did he ever describe that some of the bad suppliers were
4 coming out of Asia?

5 "A. Yes.

6 "Q. Tell me about that.

7 "A. He had mentioned that some counterfeit books from Asia
8 came through.

9 "Q. And Mr. Smyres mentioned this to you in the 2011 time
10 period, as you recall?

11 "A. I don't recall.

12 "Q. You don't remember when he said this?

13 "A. Exactly.

14 "Q. Would it have been before you had stored the books in your
15 barn or after?

16 "A. During.

17 "Q. While you were storing the books. Is that what you are
18 saying?

19 "A. (Indicates affirmatively.)

20 "Q. I need a verbal answer, please.

21 "A. Yes.

22 "Q. Thank you.

23 Is your barn locked?

24 "A. No.

25 "Q. Does the born have a front door?

I44MWIL2

"Davenport"

1 "A. A garage door.

2 "Q. Do you keep that garage door shut?

3 "A. Yes.

4 "Q. The garage door isn't itself locked?

5 "A. Correct.

6 "Q. How long did you keep these books in your barn?

7 "A. I don't recall exactly, but four, three or four months.

8 "Q. And at any time did you ask Mr. Doenges or Mr. Smyres or
9 anyone else at Book Dog Books about what you should do with
10 these books?

11 "A. I -- no. I thought they might be good books and they
12 would put them back online. I thought they were waiting to see
13 from sources if they were bad.

14 "Q. What happened next with respect to these books?

15 "A. Next after what?

16 "Q. The books aren't in your barn anymore, right?

17 "A. Now?

18 "Q. Right.

19 "A. Correct.

20 "Q. OK.

21 "A. They are all gone.

22 "Q. So at some point you took them out of the barn.

23 "A. Oh, absolutely.

24 "Q. And you destroyed them?

25 "A. Yes.

I44MWIL2

"Davenport"

1 "Q. OK. And you did that at Mr. Smyres' direction?

2 "A. Yes.

3 "Q. When was that?

4 "A. July of 2011.

5 "Q. Mr. Davenport, I have asked the court reporter to mark and
6 hand to you Exhibits 197, 198, and 199. Are these documents
7 that you produced in response to the subpoena that you were
8 served with?

9 "A. Yes.

10 "Q. And can you please describe what Exhibit 197 is.

11 "A. That's a receipt for book disposal.

12 "Q. And what is Exhibit 198?

13 "A. An expense report for that amount -- that includes that
14 amount.

15 "Q. That's an expert report that you submitted to Book Dog
16 Books?

17 "A. Yes.

18 "Q. What is Exhibit 197 -- excuse me -- 199?

19 "A. A picture of the books being disposed."

20 MR. MILLER: Can we please publish Plaintiffs' Exhibit
21 195, which is already in evidence.

22 THE COURT: You may.

23 MR. MILLER: Thank you.

24 "Q. OK. All three of these are documents that you kept in the
25 ordinary course of your business and produced in response to

I44MWIL2

"Davenport"

1 the subpoena?

2 "A. Yes.

3 "Q. With respect to Exhibit 197, does this exhibit help you
4 refresh your recollection on the date on which you disposed of
5 the books?

6 "A. Yes.

7 "Q. And what is that date?

8 "A. July 1, 2011.

9 "Q. Can you tell me the circumstances under which you took the
10 books to the Grove City dump to destroy the books?

11 "A. I spoke to Phil and he said it was time to get rid of the
12 books.

13 "Q. And did you speak to him in person or on the telephone?

14 "A. I don't really recall, but I think the phone.

15 "Q. And did he tell you to get rid of all the books?

16 "A. Yes.

17 "Q. And did he tell you why you were getting rid of the books?

18 "A. So they wouldn't creep back into circulation.

19 "Q. There was more to it than that, wasn't there?

20 "A. Well, fear of, you know, impending issues, you know, fear
21 of lawsuit, you know. It was time to destroy the books so that
22 we didn't have any -- so that we are not associated with that.

23 "Q. He didn't -- he wanted to make sure that the evidence of
24 the counterfeit books was gone, is that right?

25 "A. He didn't -- he didn't refer to them as evidence.

I44MWIL2

"Davenport"

1 "Q. OK. How did he refer to them?

2 "A. Books that needed to be thrown away.

3 "Q. But why did they need to be thrown away?

4 "A. Because -- because of the suspicion of being counterfeit.

5 "Q. And he was -- there was a specific reason he was concerned
6 that these books would get back into the marketplace, right?

7 "A. Yes. Because they were questionable, you know.

8 "Q. Mr. Davenport, was there an issue with respect to your
9 sons and the books?

10 "A. Yes.

11 "Q. You want to describe that for me, please.

12 "A. As they were stored in my barn, the pallet was uneven. It
13 had a couple of boxes that made it unlevel. So I set those
14 aside and I had a little table. And I was working on my
15 chainsaw on top of the table. I remember -- and they got --
16 you know, a couple of boxes got misplaced out of the group of
17 books.

18 "Q. So describe that for me a little bit more, if you would.

19 "A. One or two boxes just got mixed in with the other books.

20 "Q. With your K through 12 books?

21 "A. Yeah, yes. And with the other boxes in my garage of
22 miscellaneous things.

23 "Q. What kinds of books were those?

24 "A. Book boxes.

25 "Q. Other higher ed. books?

I44MWIL2

"Davenport"

1 "A. No. Clothes, pictures, Christmas stuff.

2 "Q. Book boxes that had your own personal things in them?

3 "A. Yes.

4 "Q. But there was an issue with your sons potentially taking
5 some of the books, right?

6 "A. Yes.

7 "Q. You want to describe that for me, please.

8 "A. He and his friend had gotten into the books and tried to
9 sell a few at one of the bookstores.

10 "Q. Was this both of your sons or just one of them?

11 "A. Just the one son.

12 "Q. Was this the younger son or the older son?

13 "A. The older son.

14 "Q. So at this point in time your son was 22 years old?

15 "A. 21, 22, yeah.

16 "Q. And was he living at home?

17 "A. He was going to school and living at home sometimes, but I
18 think at that time he's probably living at home. That's why he
19 was there.

20 "Q. I'm sorry. What's his name?

21 "A. Noah.

22 "Q. So Noah Davenport?

23 "A. Yes.

24 "Q. And had Noah helped you unload the books from your trunk
25 to put them in your garage in the first place?

I44MWIL2

"Davenport"

1 "A. No.

2 "Q. But Noah had access to the garage on a regular basis, I
3 take it?

4 "A. Yes.

5 "Q. Had Noah ever worked in the book business at all prior to
6 this date?

7 "A. Just helping me load and unload books, but not working the
8 business.

9 "Q. Had you paid him to help you?

10 "A. No. Just father expectation.

11 "Q. I know well.

12 So your son is roughly 21 or 22 years old and you
13 catch wind that he is selling some of the books to a bookstore,
14 is that right?

15 "A. Yes.

16 "Q. Which bookstore was he trying to sell them to?

17 "A. I believe it was UBX.

18 "Q. And --

19 "A. Ironically.

20 "Q. How did you find out he was trying to sell these to a
21 bookstore?

22 "A. An e-mail from Barb MacFarland.

23 "Q. From Barb MacFarland?

24 "A. Yes.

25 "Q. What did Barb say to you?

I44MWIL2

"Davenport"

1 "A. Suspicious book buyers. Does anyone know these guys? You
2 know. Is this your son? And it's like, yeah, that's my boy.

3 "Q. How did Barb become aware these books were counterfeit?

4 "A. Employees of the bookstore.

5 "Q. What do you mean you don't know?

6 "A. I don't know if there is was a group e-mail or not. I
7 know I got one and I thought that everyone might have gotten
8 one.

9 "Q. And then you received a second e-mail which was kind of
10 directed just to you inquiring --

11 "A. I don't know if there was a second e-mail or not.

12 "Q. You believe there was a picture attached to one of these
13 e-mails?

14 "A. Yeah. Because the question was, is that your son?

15 "Q. And did the picture or the e-mail indicate what books they
16 were trying to sell?

17 "A. No.

18 "Q. What did you do when you got this e-mail?

19 "A. I've had a lot of problems with him, so you can only
20 get --

21 "Q. With e-mails or with your sons?

22 "A. I'm sorry. With my son. And you can only get so mad so
23 often, you know, so I was mad again.

24 "Q. Let's break this down. Did you respond to Barb first or
25 did you talk to your son first?

I44MWIL2

"Davenport"

1 "A. I talked.

2 "Q. I'm assuming you went and talked to your son?

3 "A. I talked to Phil.

4 "Q. You talked to Phil before you did anything else.

5 "A. I believe so, because that happened and Noah wasn't there
6 at home.

7 "Q. When you got the e-mail Noah wasn't around?

8 "A. Correct.

9 "Q. So you called Phil?

10 "A. I don't remember all these details.

11 "Q. But you think you called Phil?

12 "A. Yes.

13 "Q. And can you describe that conversation?

14 "A. Very similar to this conversation, a very uncomfortable
15 conversation about the books that were supposed to be thrown
16 away that weren't thrown away, that were still in my barn, and
17 that Noah got into and tried to sell, you know.

18 "Q. And at that point in time, though, had you been told to
19 destroy the books?

20 "A. Yes. I had been told -- this was way after, nine months
21 or something after I had been told to destroy the books.

22 "Q. Was this after July 1 of 2011?

23 "A. Yes.

24 "Q. When you took the books to the dump on July 1, 2011, you
25 didn't take all the books to the dump?

I44MWIL2

"Davenport"

1 "A. I thought I did, but some of them had been misplaced.

2 "Q. And it was the misplaced books that your son was trying to
3 sell?

4 "A. Yes.

5 "Q. What did you tell Phil?

6 "A. Some of the books I was supposed to throw away broke
7 containment, and Noah tried to sell some at UBX.

8 "Q. What did Phil say?

9 "A. How did that happen, you know, and I said, they got
10 separated and Noah dug through them.

11 "Q. What did Phil tell you to do? At this point Phil was not
12 a father, right?

13 "A. Right, exactly.

14 "Q. So --

15 "A. I don't really recall.

16 "Q. I think you said it was nine, roughly nine months after
17 you were told to destroy the books. Does that mean it was
18 roughly nine months after July 1, 2011?

19 "A. Yes.

20 "Q. So I guess really the first question I should ask you is
21 when you were told to destroy the books, this was on or around
22 the time that you did destroy them?

23 "A. Yes."

24 MR. MILLER: Can we put PX 195 back up, please.

25 "Q. Describe what you did to destroy them.

I44MWIL2

"Davenport"

1 "A. You can't see it here, but there is -- there it is. If
2 you look here on 199, there is a loader and there is actually
3 another picture that I had provided that the --"

4 MR. MILLER: Continue on the top.

5 "A. OK. The second picture is the books being run over by
6 earth-moving equipment.

7 "Q. How did you take this picture?

8 "A. With my phone.

9 "Q. Why did you take this picture?

10 "A. To prove we were destroying the books.

11 "Q. But all you did was to unload the books at the dump and
12 watch them got run over?

13 "A. Yes.

14 "Q. Mr. Davenport, you've been handed what's been marked as
15 Exhibit 200. Can you describe what this is, please.

16 "A. This is the destruction process that I used to destroy the
17 books.

18 "Q. So this is a photo that you took and retained in the
19 ordinary course of business?

20 "A. Correct.

21 "Q. And it shows the destruction of the books that are
22 contained in Exhibit 199?

23 "A. Correct.

24 "Q. In terms of sequence, which of the two photos was taken
25 first?

I44MWIL2

"Davenport"

1 "A. 199."

2 MR. MILLER: Can we leave PX 195 up, please.

3 "Q. As I look at 199, there appears that there are books on
4 the right and books on the left and a big trench in the middle
5 where it appears as though a truck may have gone through?

6 "A. Correct. That's where I parked.

7 "Q. You parked in the middle and you offloaded to the right
8 and left?

9 "A. Most -- exactly. I didn't realize this was going to be
10 evidence in a court. It just -- it was just like covering our
11 rears at the time. It seemed like just to make sure it
12 happens. It didn't seem like -- otherwise, I would have
13 watched. I would have proved it with a better photograph.

14 "Q. So you took the picture so you would have some evidence
15 that the books had been destroyed?

16 "A. Yes.

17 "Q. And did you do that -- were you told to do that?

18 "A. No. It was my idea partly because I was too, you know --
19 because I didn't do the water. I was like, see, this will
20 work. It's easier, quicker.

21 "Q. Did you send the photos to Mr. Smyres afterwards?

22 "A. I don't recall honestly if he saw them or not. My guess
23 is I did because I thought it was kind of cool.

24 "Q. At the time you destroyed the books in July of 2011, were
25 you suspicious that maybe you hadn't gotten all the books?

I44MWIL2

"Davenport"

1 "A. No.

2 "Q. Did you open up the books and look inside of them before
3 you took them to be destroyed?

4 "A. No.

5 "Q. Were the books physically on a pallet in your garage?

6 "A. Yes.

7 "Q. So did you load the pallet in and out of your garage using
8 a pallet loader or a forklift?

9 "A. No.

10 "Q. When you put them into your truck, you didn't put them on
11 a pallet, you just put them into your truck?

12 "A. Yes.

13 "Q. You received an e-mail from Barb MacFarland in, you said
14 it was roughly nine months or so after July of 2011?

15 "A. Yes.

16 "Q. Was that roughly in March or April of 2012?

17 "A. Yes.

18 "Q. And you said that your first response is to call Phil
19 Smyres?

20 "A. Yes.

21 "Q. And at that time what did Phil Smyres tell you to do?

22 "A. Phil was upset and asked me, you know, about the
23 circumstances, and I told him no. I had grabbed a few books
24 and tried to cash them in at UBX. He is pretty familiar with
25 the issues I've had with Noah, you know. He asked about the

I44MWIL2

"Davenport"

1 books and I told him that, you know, he just had a few. I told
2 him a few books got left behind. He was upset, you know,
3 because, so --

4 "Q. Mr. Smyres was upset?

5 "A. Yes.

6 "Q. Really upset?

7 "A. For Phil.

8 "Q. He doesn't get upset easily?

9 "A. He's not a yeller.

10 "Q. But he yelled on this call?

11 "A. He was upset. I don't recall yelling or not yelling, but,
12 you know, this wasn't a good circumstance to tell your
13 employer.

14 "Q. So what did he say? I mean, how did he manifest that
15 upsetness?

16 "A. Well, he asked about the circumstance, you know, and how
17 did this happen. And mea culpa, my bad. I just, you know --
18 and he asked, you know, about Noah, and I just told him he
19 wasn't there, you know.

20 "Q. Did you know the number of books at this point that Noah
21 had taken?

22 "A. I didn't.

23 "Q. So you really didn't know during this conversation the
24 extent of the problem?

25 "A. Exactly.

I44MWIL2

"Davenport"

1 "Q. Did Phil ask you to go figure that out?

2 "A. Yes.

3 "Q. What happened next?

4 "A. Well, I waited for Noah to come home, and he had already
5 thrown the books away, and I didn't tell Phil about the boxes
6 of books. I threw them away on my own, you know. I wanted
7 this to not be true, so I didn't say anything about the books,
8 the boxes of books that got left behind, and I just waited
9 until trash day and threw them in the trash.

10 "Q. When you talked to Phil, did he tell you there was already
11 an ongoing lawsuit?

12 "A. Yes. That's why he was upset.

13 "Q. And did he tell you that he had sued the publishers?

14 "A. No.

15 "Q. But he had told you that the publishers had sued him?

16 "A. Yes.

17 "Q. Over counterfeit books?

18 "A. Yes.

19 "Q. Did he tell you that he wanted to make sure that the books
20 had been destroyed because of the lawsuit?

21 "A. That's why we were destroying the books, you know, back in
22 July.

23 "Q. So tell me about the conversation with your son. How did
24 that go down?

25 "A. You are going to got me fired, dude, you know. This is

I44MWIL2

"Davenport"

1 the kind of thing that is irresponsible behavior you've been
2 doing. I remember jumping up and down, you know, because I was
3 so upset, you know. I knew this wasn't supposed to happen.

4 "Q. What did he say? Did he deny it?

5 "A. No. I mean, we had him on tape. He's, you know -- no. I
6 didn't ask him if he did it or not. Like it had already been
7 demonstrated.

8 "Q. So how did you know that there were books -- I said
9 garage, but I meant barn.

10 "A. Yeah. It's a barn garage. I have like a little garage
11 door in a barn, whatever.

12 "Q. How did you know there were more books -- more of the
13 counterfeit books in the barn?

14 "A. Where did you get the books? In the barn.

15 "Q. Did you ask him to show you?

16 "A. Yeah.

17 "Q. So you walked out there with him?

18 "A. Yeah.

19 "Q. How many boxes were left?

20 "A. Two.

21 "Q. Were they two full boxes?

22 "A. More or less, yeah.

23 "Q. And did you look in them?

24 "A. Yeah.

25 "Q. So -- and so had he taken probably a third box? Is that

I44MWIL2

"Davenport"

1 what happened?

2 "A. No. He just reached in and grabbed a few.

3 "Q. And did you keep a list of the books that were left in
4 those boxes?

5 "A. No.

6 "Q. Take a picture of them?

7 "A. No. I threw them away.

8 "Q. When did you throw them away?

9 "A. Next available trash day.

10 "Q. And why did you throw them away?

11 "A. Because I didn't -- I was embarrassed of the whole
12 situation and I didn't want any part of this, and I didn't want
13 to even admit that there were more than a couple of books. I
14 was trying to contain it into a couple of books got misplaced
15 and --

16 "Q. But you knew that there was a lawsuit about them?

17 "A. Yeah.

18 "Q. Was there any punishment for your son?

19 "A. I mean, there is nothing left to punish. He lost his
20 license now. I was mad. Punishment was just continued anger.

21 "Q. Did you have a follow-up discussion with Mr. Smyres about
22 all of this?

23 "A. I haven't really talked about it much with him. It wasn't
24 something I wanted to talk about, you know. I mean, we have
25 talked about it since and, you know, recanting the story.

I44MWIL2

"Davenport"

1 "Q. Well, as I understand it, at the time that you first spoke
2 to Mr. Smyres you didn't know the extent of the issue because
3 you hadn't yet spoken to your son, right?

4 "A. Right.

5 "Q. He tells you -- I thought he had said he had told you to
6 go figure that out?

7 "A. Yeah.

8 "Q. You confront your son. The two of you walk into the barn.
9 You realize there are a couple of books, counterfeit books
10 there, still there. Did you ever report back to Mr. Smyres or
11 have a follow-up discussion with him or send him an e-mail at
12 all about any of this?

13 "A. Yeah. I told him soon, soon around when this happened,
14 you know, I told him that Noah threw the books away.

15 "Q. And did you tell him that by telephone, in person?

16 "A. Telephone.

17 "Q. But that wasn't true?

18 "A. It was true.

19 "Q. Well --

20 "A. Noah threw his books away.

21 "Q. But not all the books?

22 "A. Correct.

23 "Q. And you didn't tell Mr. Smyres there were other books?

24 "A. Correct.

25 "Q. And what did Mr. Smyres say?

I44MWIL2

"Davenport"

1 "A. He said -- I mean, they were supposed to be thrown away
2 anyway. I mean, they were supposed to be thrown away.

3 "Q. Was he happy that they had finally been thrown away?

4 "A. That they were destroyed, as they were supposed to be in
5 the first place, yeah.

6 "Q. He was happy with that result?

7 "A. Yes.

8 "Q. He didn't ask you where they had been thrown away?

9 "A. No. I mean, he might have and I just said campus. That
10 was all we knew.

11 "Q. But nobody tried to go and find the books?

12 "A. No.

13 "Q. When you disposed of the two boxes of counterfeit books in
14 March or April of 2012, how did you do that?

15 "A. The trash truck.

16 "Q. That came to your house?

17 "A. Yes.

18 "Q. Did you do anything to actually physically destroy the
19 books other than putting them in the trash truck?

20 "A. No.

21 "Q. OK. Have you at any time been told by anybody at Book Dog
22 Books that there was a need to preserve evidence related to the
23 publishers' lawsuit?

24 "A. I was told that by Tiffany.

25 "Q. OK.

I44MWIL2

1 "A. No.

2 "Q. So the only person who told you to preserve evidence was
3 Ms. Miller?

4 "A. Yes.

5 "Q. And was that in writing?

6 "A. No.

7 "Q. So in 2009, when you destroyed, you first destroyed
8 counterfeit books, do you recall whether or not you ever
9 discussed the propriety of that destruction?

10 "A. I don't recall discussing it.

11 "Q. In 2011, when you destroyed the counterfeit books, did you
12 have a discussion with anybody as to whether it was proper to
13 destroy them?

14 "A. No. I was told to do it, so I was expecting it was
15 proper.

16 "Q. You were told to do it by Mr. Smyres, is that right?

17 "A. Yes."

18 MR. MILLER: Nothing further, your Honor.

19 THE COURT: Members of the jury, that completes the
20 reading of deposition testimony of Mark Charles Davenport.

21 Would defendants call their next witness.

22 MR. BHANDARI: Your Honor, we have designated the
23 portions of the Singh transcript that should be read. I think
24 the plaintiffs might have some issues with it. May we approach
25 or may we take a short break to sort this out?

I44MWIL2

1 THE COURT: We will take a five-minute recess, members
2 of the jury. Keep an open mind. Don't discuss the case.

3 Please recess the jury.

4 (Jury not present).

5 MR. OPPENHEIM: Your Honor, I think what the problem
6 is here is that the defendants have added significant
7 additional designations that weren't originally provided, so we
8 are now, just this morning, after our conference with you, your
9 Honor, trying to go through those additional designations,
10 check them. There are a lot of objections. We haven't looked
11 at them before. I don't think it's frankly proper, but I don't
12 know what to do about it. I think that they should be limited
13 to their prior designations. It was what was in the pretrial
14 report.

15 THE COURT: What's going on, Mr. Bhandari?

16 MR. OPPENHEIM: They did provide us yesterday the
17 list. I apologize. It wasn't this morning. It was yesterday.
18 But it's new designations. We are working through it.

19 THE COURT: We have been at this for almost two hours.
20 What's the big deal with looking at the designations?

21 MR. BHANDARI: I don't know, your Honor.

22 MR. OPPENHEIM: I'm catching up. We did get a list
23 yesterday. They have added to that list that we got about a
24 half hour ago. We are just looking at it for the first time
25 and those designations we have never looked at. There were

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1 three lawyers there, lots of objections in that deposition. We
2 didn't counterdesignate for these new ones. Frankly, your
3 Honor --

4 THE COURT: What are all the new designations, Mr.
5 Bhandari, in the last half hour?

6 MR. BHANDARI: There aren't new designations, your
7 Honor.

8 You will remember when I spoke yesterday, I said that
9 we intended to designate between 193 and 222 and then I read
10 you a short excerpt saying, this is the reason why it's all
11 going to be relevant. These are the 193, so I think it goes
12 until 229, as opposed to 223, because some of the stuff they
13 wanted was outside of the 223 range. And so it was what I said
14 yesterday. It's just that 25-page section that -- we are not
15 reading the whole thing. This is -- in fact, we cut it down
16 dramatically within there. We want to take out the colloquy as
17 well. So I don't think there should be an issue, but I can't
18 speak to what the issue is with the plaintiffs. Maybe there is
19 not an issue.

20 MR. OPPENHEIM: It's six additional pages, at least,
21 beyond what we were looking at yesterday.

22 MR. BHANDARI: Based on your additions. That's the
23 reason it goes beyond.

24 THE COURT: Complete the review right now.

25 MR. BHANDARI: Are there objections that you want to

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1 take to the judge? Because it looks like you have completed
2 your review. I am not sure what your comments mean.

3 THE COURT: Are there objections that need to be
4 resolved by the Court to any of the readings?

5 MR. MANDEL: So far we have one substantive objection.
6 Mr. Singh was asked who the defendants are and he said they
7 might be textbooks.com. It's undisputed we are not
8 textbooks.com. We wish we were textbooks.com. We don't own
9 that website. For them to suggest to the jury that we are
10 textbooks.com is incredibly misleading.

11 MR. OPPENHEIM: Your Honor, Mr. Mandel asked the
12 question:

13 "Q. To the best of your knowledge, are you aware of any
14 information, any source in any way related to BDB that is on
15 this list other than Textbooks R Us?

16 "A. I think based on our previous discussion, textbooks.com
17 may also be related.

18 "Q. Textbooks.com?

19 "A. I believe, but I may be wrong about that."

20 It goes to exactly the issue that we are putting
21 forward, which is this witness doesn't know what this is. Mr.
22 Mandel asked the question. He got the answer. Now he doesn't
23 like the answer. He doesn't want it read in.

24 THE COURT: Overruled.

25 Any other objection?

I44MWIL2

1 MR. MANDEL: They would like to read in a series of
2 objections that the lawyers made. We think that's
3 inappropriate.

4 THE COURT: It is. We are not going to read in any
5 objections.

6 MR. MANDEL: Then I believe they have a series of
7 objections. We have no further objections, your Honor.

8 MR. OPPENHEIM: I was just asking opposing counsel,
9 where are the objections.

10 MR. MANDEL: I will hand them back to you so you can
11 make whatever objections you would like to make.

12 MR. GOULD: Your Honor, would this be a helpful time
13 to hand up the verdict form with a couple of typos?

14 THE COURT: Hand them to my law clerk.

15 MR. OPPENHEIM: We are fine with not reading those
16 objections in or raising the objections.

17 THE COURT: One other instruction. When this
18 transcript is read, it's not necessary to read false starts.
19 Spare the court reporter and the jury reading false starts.
20 Just go to the question.

21 MR. MANDEL: We will do our best, your Honor.

22 THE COURT: Are we ready to go?

23 Mr. Bhandari, approximately how long is this reading?

24 MR. BHANDARI: We haven't timed it. I think it's
25 probably about 20 to 30 minutes.

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1 THE COURT: We will take five more minutes for our own
2 for a break and then let's go.

3 (Recess)

4 MR. OPPENHEIM: If I can briefly read a section that I
5 think is not relevant, was objected to and should be omitted.

6 "Q. After the higher education publishers' inspections, did
7 Chegg stop purchasing from any of its suppliers other than
8 Springfield Gardens and South Florida Groups which you have
9 already testified about earlier today?"

10 Objection.

11 "THE WITNESS: We continue to do business with our
12 wholesale partners.

13 "Q. Am I correct that you testified earlier that Chegg
14 continues to do business with BDB, correct?

15 "A. Yes."

16 I'm fine with that.

17 Then it goes on:

18 "Q. And Chegg continues to purchase books from BDB because
19 Chegg believes BDB is a good supplier, correct?"

20 Objection.

21 "A. We continue to buy books from BDB."

22 That should be out.

23 Then it goes on:

24 "Q. If you concluded that BDB was a bad supplier, would you
25 continue to buy books from BDB?"

I44MWIL2

1 Objection.

2 "A. We continue to do business with BDB."

3 That should be out.

4 "Q. Why does Chegg continue to do business with BDB?

5 "A. We have an established relationship with BDB. They are an
6 efficient provider of books to us. They are a partner on our
7 side where they buy books from us as well."

8 That's fine.

9 And then last one:

10 "Q. If Chegg believed that BDB was indirectly supplying Chegg
11 with counterfeit books, would Chegg continue to do business
12 with BDB?"

13 Objections all around.

14 "THE WITNESS: We would not."

15 That should be out.

16 "Q. Very simple question. Are you continuing to do business?
17 Fine. Start characterizing the nature of the relationship
18 good, bad."

19 That should be out, your Honor.

20 MR. MANDEL: They have offered extensive evidence in
21 this case as to which distributors stopped doing business with
22 us. They have mentioned I'm guessing on more than a dozen
23 occasions the fact that Follett stopped doing business with us.
24 This is a deposition transcript in which Chegg is being asked,
25 are you continuing to do business with us and why? They have

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1 opened the door to testimony surrounding who is doing business
2 with us, who is not doing business with us. It was at a
3 deposition. It's a hundred percent admissible, your Honor.

4 MR. OPPENHEIM: I have no objection, your Honor, to
5 that portion where they say they are continuing to do business
6 with them. My objection --

7 THE COURT: I know what your objection is to. The
8 objection is overruled.

9 Let's bring in the jury.

10 (Continued on next page)

I44VWIL3

1 (Jury present)

2 (At sidebar)

3 THE COURT: What's the problem now?

4 MR. BHANDARI: Your Honor, we spent all morning
5 highlighting two copies of these, kindly given to us by the
6 plaintiffs in this case because we only had electronic copies.
7 The two highlighted copies are the only copies we have of this.
8 So we either need to have the two highlighted copies so one
9 person can read the answers and one person can read the
10 questions, or one of the plaintiffs can read the questions and
11 we can give the answers if they want to follow along and keep
12 their copy. But there's only two highlighted copies that have
13 to be used.

14 MR. OPPENHEIM: Your Honor, this isn't our reading.
15 We're not going to read; we're not going to put a witness on
16 the stand for it because it's not us, that's number one.

17 Two, we brought two copies, we gave them one of them.
18 We need to have the other to follow along. If they didn't
19 bring copies -- and I try to be as hospitable as possible, but
20 this is not our problem.

21 THE COURT: Give me the document.

22 Go make a copy. I think the highlighting should show
23 up.

24 MR. BHANDARI: Thank you, your Honor.

25 MR. GLUNT: Thank you very much, your Honor.

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1 MR. OPPENHEIM: Thank you, your Honor.

2 THE COURT: This is really verging on the absurd.

3 (In open court)

4 THE COURT: I just found out we need another copy of
5 what's going to be read. It's not many pages; it's being
6 Xeroxed at the moment, if I can use the trademark term
7 "Xeroxed" in a trademark case.

8 After this portion of testimony is read, it's my
9 belief that the parties will be resting. We'll then take a
10 very short recess and we'll turn to closing statements. So
11 we're making progress.

12 I told you that a trial is always dynamic; you never
13 know exactly how things are going to break or what arguments
14 are going to be raised by counsel. Generally, the closer you
15 get to the end of the trial, the more arguments are raised by
16 counsel, which is why we spent a lot of time together last
17 night and throughout this recess and other times. So just bear
18 with us for a moment.

19 I understand there could be some big thunderstorms
20 coming through here around lunchtime. But you don't have to
21 worry about that because you'll be having lunch here.

22 One of the things that I will extract from you is that
23 we will be taking a shorter lunch break, okay, probably like
24 just a half-hour lunch break, because you'll be in the jury
25 room. And then we'll complete closing arguments and I'll

I44VWIL3

"Singh"

1 deliver my charge to you. And then we'll review the jury
2 verdict sheet, which will be an exercise for us for a few
3 minutes.

4 And so that we've set the stage at this point, would
5 the defendants call their next witness.

6 MR. GLUNT: Yes, your Honor. We call Harjit Singh by
7 deposition. This is the deposition that was taken on November
8 11th, 2016 in San Jose, California.

9 THE COURT: And in the first question and answer will
10 Mr. Singh be revealing to us who he is and what entity he's
11 affiliated with or do you want to just tell us right now so the
12 jury has that in mind?

13 MR. GLUNT: Yes, your Honor. He was a representative
14 of Chegg, C-H-E-G-G.

15 THE COURT: All right. So whoever is going to take
16 the witness stand, why don't -- all right. Mr. Klein, come on
17 up.

18 Are we good to go?

19 MR. GLUNT: I believe so your Honor.

20 THE COURT: All right. Let's proceed.

21 (The deposition of Harjit Singh was read as follows)

22 "Q. Is this -- does this document list all of the Chegg books
23 that the higher education publishers inspected?

24 "A. I can't confirm. This is, like you said, 3,000 pages.

25 There were approximately 64,000 books that were inspected, so

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"Singh"

1 this equals 64,000, and it matches up to that list. The answer
2 would be yes; but, again, I can't go through all these and
3 validate that it is an accurate representation here.

4 "Q. Would it be easier if I gave you this document in Excel?"

5 THE COURT: I'll tell you what, here's how we're going
6 to do it. Give the page and line number that you start with
7 each series, that way the parties will know.

8 MR. GLUNT: Sure.

9 So on page 195, beginning on line 19.

10 MR. KLEIN: That is not highlighted on mine, just to
11 be clear.

12 THE COURT: I understand.

13 Once again, here's what we're going to do: You have a
14 highlighted copy, right?

15 MR. GLUNT: He has the original. Let's switch copies.

16 THE COURT: Switch copies.

17 MR. GLUNT: Thank you very much, your Honor.

18 THE COURT: Now, at the beginning of each reading,
19 Mr. Glunt, you'll call out the page and line number that you're
20 starting the question with.

21 MR. GLUNT: Absolutely, your Honor.

22 THE COURT: Thank you.

23 MR. GLUNT: So now beginning on page 196, line 11.

24 (Reading)

25 "Q. I'm going to show you what is also contained -- an Excel

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"Singh"

1 file, which is also contained on Chegg Exhibit 8, and this is
2 also a document that has been Bates stamped Chegg 22. It is
3 the same as the PDF I just sent you except in Excel format.

4 "And I would ask you to take a look at that, validate
5 that to the extent that you have -- that you wanted. But I
6 need to get clarity on the issue of whether this is an accurate
7 list of all the books, all the Chegg books that the higher
8 education publishers inspected in 2016."

9 THE COURT: Question, line 2.

10 MR. GLUNT: Sorry, my apologies.

11 Question, line 2: "Let's do this. Let me back up.
12 Does this list also include Ingram Books?

13 "A. It does."

14 MR. GLUNT: Question, line 8, on page 197: "Is Chegg
15 Exhibit 8 a list of all the Chegg and Ingram Books that the
16 higher education publishers inspected in 2016?

17 "A. Correct.

18 MR. GLUNT: Question, line 12 --

19 THE COURT: You don't have -- you can continue to just
20 keep reading questions, if it's consecutive; you don't have to
21 call out every line number.

22 MR. GLUNT: Understood, your Honor. But having seen
23 the copy, it's sometimes very difficult to tell, so I just
24 wanted to make it very clear.

25 "Q. Have the higher education publishers inspected any Chegg

I44VWIL3

"Singh"

1 books in calendar year 2016 that are not identified on Exhibit
2 8?

3 "A. Only the ones where we identified them as part of
4 purchases and that we sent over for validation prior to taking
5 into our inventory.

6 "Q. Were any BDB books sent to the higher education publishers
7 for purposes of validating them prior to entering them into
8 Chegg's inventory in 2016?

9 "A. I don't believe so.

10 "Q. Have the higher education publishers inspected any Chegg
11 books any time prior to January 1st, 2016?

12 "A. Not to my knowledge.

13 "Q. Now, I would like to walk through each of the columns on
14 this."

15 MR. GLUNT: Then continuing on page 199, on line 14:

16 "Q. Turning your attention, Mr. Singh, to the first column
17 EAN. What does 'EAN' mean?

18 "A. It's the ISBN.

19 "Q. And what is an ISBN?

20 "A. It's a unique identifier for a book.

21 "Q. What information is contained in the title column?

22 "A. The title of the book.

23 "Q. What information is contained in the source column?

24 "A. Where we purchased or how we acquired that book.

25 "Q. How does Chegg track the source of its books?

I44VWIL3

"Singh"

1 "A. In our systems when books are received in, we identify how
2 we procured that book.

3 "Q. How accurate is Chegg's source information?

4 "A. It's a system that we rely on.

5 "Q. How is BDB described in the source column?

6 "A. It will be described as 'prebuy underscore TRUS,' as well
7 as, I believe, TextbookRush.

8 "Q. I would ask you to take a look a closer look at that
9 spreadsheet. Am I correct that the only way that BDB is
10 identified in Chegg Exhibit 8 is by Textbooks R Us?

11 "Are you accustomed to using Excel, Mr. Singh?

12 "A. There's Textbooks R Us and pre-buy. I was mistaken when I
13 said TextbookRush. It was -- I was mistaken when I said
14 TextbookRush, it was Textbooks R Us.

15 "Q. Pre-buy is on this document?

16 "A. I think actually I believe what we did was we -- to
17 simplify it, we changed pre-buy to be Textbooks R Us. That way
18 it would not be listed on here with two separate names.

19 "Q. Okay. But am I correct that the -- well, let me just step
20 back for a second. Other than Textbooks R Us, is BDB
21 represented on this list with any other name?

22 "A. You know, the names that we have in here are the sources
23 that we purchased the books from. If there are other entities,
24 you know, that were identified that are also related to BDB,
25 then they would be in here as well, called that with that name.

I44VWIL3

"Singh"

1 "Q. To the best of your knowledge, are you you aware of any
2 information, any source, in any way related to BDB that is on
3 this list other than Textbooks R Us?

4 "A. I think based on our previous discussion, textbooks.com
5 may also be related.

6 "Q. Textbooks.com?

7 "A. I believe, but I may be wrong about that."

8 MR. GLUNT: On page 202, line 3.

9 "Q. Am I correct that an earlier version of this document
10 identified in part BDB as pre-buy TRUS?

11 "A. In our source system it would be listed as pre-buy TRUS.

12 "Q. Why in your source system is it listed as 'pre-buy TRU'?

13 "A. It's when -- it's a system limitation for that channel.
14 Every vendor is listed as pre-buy, underscore, a designation.

15 "Q. And that channel is the merchant buyback channel?

16 "A. No, it is the pre-buy channel.

17 "Q. The pre-buy channel.

18 "And is the pre-buy -- turning your attention to Chegg
19 Exhibit 1, do you have Chegg Exhibit 1 there?

20 "A. Yes.

21 "Q. Is the pre-buy channel books that BDB procures for Chegg
22 under Chegg Exhibit 1?

23 "A. They are not.

24 "Q. Which books -- do you know what agreement governs the
25 pre-buy relationship between Chegg and BDB?

I44VWIL3

"Singh"

1 "A. There is a pre-buy specific contract that we have in
2 place."

3 MR. GLUNT: Turning to page 204, line 10.

4 "Q. Mr. Singh, how is this document created?

5 "A. We have a database that we are keeping of the -- of the
6 books that have been reviewed as part of these audits. And so
7 we did a query of that database to pull this data.

8 "Q. And does that database identify books that Chegg obtained
9 from BDB through the pre-buy relationship as pre-buy TRUS?

10 "A. I believe it does. I would have to confirm with the team
11 on that."

12 MR. GLUNT: So moving then to page 207, the question
13 beginning on line 4.

14 "Q. With respect to Chegg Exhibit 8, which -- through which --
15 with respect to the books on Chegg Exhibit 8 that Chegg
16 procured from BDB, through which channels did Chegg procure
17 these -- those books?

18 "A. Are you talking about each individual book?

19 "Q. Was one of the channels through which Chegg acquired books
20 from BDB that are listed on Chegg Exhibit 8? I don't want to
21 go, not quite yet. I want to just start with the basic
22 question. Were all -- it seems that pre-buy -- the pre-buy
23 channel was one of the channels through which Chegg acquired
24 books from BDB that are listed on Chegg Exhibit 8; is that
25 correct?

I44VWIL3

"Singh"

1 "A. Sure.

2 "Q. So generally, what other channels did Chegg obtain books
3 from BDB with respect to books that are listed on Chegg Exhibit
4 8?

5 "A. Two main channels will be the pre-buy program that we
6 talked about, as well as customer direct fulfillment. So that
7 is what we previously talked about where we have an order that
8 goes directly to Book Dog Books to fulfill on our behalf
9 directly to a student. Those are the two primary channels.

10 "Q. To Chegg's internal systems identify which channel these
11 books came from?

12 "A. Yes.

13 "Q. To the best of your knowledge, with respect to the books
14 that are listed on Chegg Exhibit 8 that Chegg obtained from
15 BDB, were any of them obtained from a channel other than the
16 pre-buy channel or the customer direct fulfillment channel?

17 "A. We talked previously about the merchant buyback program.
18 That is a relatively small channel for us. There may be some
19 books that came through that channel. Without doing a deep
20 analysis, I could not say one way or the other whether any
21 books came through that channel.

22 "Q. Remind me, is the customer direct fulfillment channel a
23 rental channel?

24 "A. It is a rental channel, as well as a purchase channel.
25 But obviously a purchased book goes directly, and we do not

I44VWIL3

"Singh"

1 generally get those back.

2 "Q. So you would expect that at least with respect to those
3 BDB books that are listed on Chegg Exhibit 8, if they fall
4 within the customer direct fulfillment channel, they were most
5 likely rentals?

6 "A. Yes.

7 "Q. Turning your attention to the SKU column, what is the SKU?

8 "A. It is the unique identifier that Ingram assigns.

9 "Q. And that's the unique identifier you testified about
10 earlier today?

11 "A. Correct.

12 "Q. What is the finding column?

13 "A. It was a result of the audits.

14 "Q. Did Chegg play any role in determining what the result of
15 the audit was?

16 "A. No, we did not.

17 "Q. So am I correct the information listed in the finding
18 column came entirely from the higher education publishers?

19 "A. It would be based on their feedback back to us on their
20 designation of a specific book.

21 "Q. How did the higher education publishers provide Chegg with
22 that feedback?

23 "A. Via email.

24 "Q. When Chegg received --

25 "A. I'm sorry, let me clarify that.

I44VWIL3

"Singh"

1 "For books that were cleared, they were provided as
2 part of the audit and they were not identified as suspect. And
3 the books that were not identified as such were flagged as
4 clear.

5 "Q. Okay. And who selected which books were identified as
6 suspect?

7 "A. Publishers.

8 "Q. Am I correct that the only two -- categories, thank you,
9 categories in this column are clear and suspect?

10 "A. There is another category, and they are called 'Pending
11 Further Review.' That is a fairly small subset. My
12 understanding is that that came out of the last audit where
13 they were not necessarily flagged as suspect; but there was
14 additional validation that the publishers wanted to do. I
15 would have to dig into it a little bit further around. But it
16 was a relatively small subset.

17 "Q. Can you check to see if there is anything on Chegg Exhibit
18 8 that is pending further review?

19 "A. There are.

20 "Q. There are?

21 "A. There are. There's approximately 70 or so.

22 "Q. Do you know why it is those approximately 70 were flagged
23 as pending further review?

24 "A. I do not know.

25 "Q. What information is contained in the audit date column?

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"Singh"

1 "A. Just location and the date of the audit.

2 "Q. Can you describe the process the higher education
3 publishers went through as they were inspecting the books?

4 "A. I don't know their parameters for inspection. We provided
5 the books; they inspected them. Books that they identified as
6 suspect we boxed and sent to them. Books that were identified
7 as cleared, we scanned back into the system and made them
8 available again.

9 "Q. Did Chegg have an opportunity to observe the higher
10 education publishers inspecting the books?

11 "A. For the most part, no.

12 "Q. To some extent did Chegg have an opportunity to observe
13 the higher education publishers inspecting the books?

14 "A. Incidentally, if we came in to help them move books
15 around, carts around, or to take carts out of the room."

16 MR. GLUNT: Beginning on page 212, the question on
17 line 12.

18 "Q. If the higher education publishers identified a book as
19 suspect, what would happen to that book?

20 "A. It was placed on a separate cart that was reserved for
21 suspected books. As the cart filled up, it was wheeled out of
22 the room. The Ingram folks, as well as Chegg folks, we would
23 box those up. And after the audit, those would all be shipped
24 over to the individual publishers. They would be placed into
25 specific -- they were placed -- as they were identified, they

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"Singh"

1 were on specific carts for each publisher and then they were
2 boxed up and sent to that publisher.

3 "Q. Were there any books that the higher education publishers
4 flagged as suspect that were not shipped to the publishers?

5 "A. That were flagged as suspect, we shipped all of them that
6 were on the carts that were provided to us.

7 "Q. And were there any books that were not flagged as suspect
8 that were then shipped to the publishers?

9 "A. Only if they were miscategorized on a cart.

10 "Q. Do you have any knowledge of any books being
11 mischaracterized during this inspection process?

12 "A. There were a few books that were. There were a few books.

13 "Q. When you say "a few books," are you talking about less
14 than [REDACTED] or less than [REDACTED]?

15 "A. I'm talking about [REDACTED] to [REDACTED], from my knowledge.

16 "Q. How many books did the higher education publishers flag as
17 suspect?

18 "A. It was approximately [REDACTED].

19 "Q. And how many of those [REDACTED] were Chegg books?

20 "A. I don't have that data. We have not -- we considered this
21 to be one pool of inventory; we have not necessarily broken it
22 out that way.

23 "Q. Why?

24 "A. Just from a business perspective, we as an operation, that
25 is one set of inventory that we look at.

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"Singh"

1 "Q. Didn't Chegg want to know how many of its -- of its books
2 in inventory the higher education publishers flagged as
3 suspect?

4 "A. We haven't gone to -- I mean we haven't necessarily broken
5 it out that way. Again, we focused on fixing any system issues
6 that we have had that preclude -- that we have that preclude us
7 from this. We have focused in on identifying, you know, where
8 our sources of fraudulent books, sources of counterfeit books
9 and filling those holes. At some point or other, sure, we
10 would do that analysis. But for right now, we focus on making
11 improvements.

12 "Q. Did the higher education publishers say anything to Chegg
13 about which books they were flagging as suspect?

14 "A. There was no discussion around the books that were
15 identified. There were carts that were clear, carts that were
16 identified as suspect.

17 "Q. Did the higher education publishers represent to Chegg
18 that the books that they were flagging as suspect were actually
19 counterfeit?"

20 MR. GLUNT: I apologize. Beginning on page 215, line
21 18.

22 "Q. Did the higher education publishers represent to Chegg
23 that the books they were flagging as suspect were actually
24 counterfeit?

25 "A. Coming out of that process, there was no formal

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"Singh"

1 designation that these were indeed counterfeit. Some books
2 were returned back to us and is cleared, and when we have put
3 those back into inventory.

4 "Q. How many books were returned to Chegg as cleared?

5 "A. I don't have the exact number. I would say it's between
6 [REDACTED] and [REDACTED].

7 "Q. And were any of those BDB books?

8 "A. I don't know.

9 "Q. How many Ingram Books were returned to Ingram as cleared
10 after they were initially sent to the higher education
11 publishers?

12 "A. That number that I mentioned earlier is a joint number.
13 For my purposes I'm considering it one pool of inventory. We
14 are not necessarily breaking these out across ownership lines.

15 "Q. Did Chegg or Ingram refuse to ship any books that the
16 higher education publishers flagged as suspect to the higher
17 education publishers?

18 "A. We did not.

19 "Q. Were the [REDACTED] to [REDACTED] books that were returned as cleared
20 from a single publisher or from multiple publishers?

21 "A. Multiple publishers.

22 "Q. Which publishers?

23 "A. It was -- it would be from all three: McGraw-Hill,
24 Cengage, and Pearson. One thing, I think to clarify earlier,
25 we defined the group as being publishers, and there were four

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"Singh"

1 publishers. These audits were only with three publishers, the
2 ones I just mentioned.

3 "Q. Why did the other higher education publishers not
4 participate?

5 "A. I have no idea.

6 "Q. What did Chegg and Ingram do with the books that the
7 higher education publishers inspected but cleared?

8 "A. We scanned them back into inventory and made them
9 available.

10 "Q. What, if anything, did the higher education publishers say
11 to Chegg about such books?

12 "A. That they are clear.

13 "Q. Did the higher education publishers tell Chegg that those
14 books were authentic books?

15 "A. I don't think that's the terminology that was ever used.

16 MR. GLUNT: So continuing on page 222, the question
17 beginning on line 3.

18 "Q. How about Texas Books?

19 "A. I don't know offhand what their rate was."

20 MR. OPPENHEIM: Hold on. I'm sorry.

21 MR. GLUNT: Am I missing a page? Oh, yeah, 219.
22 Sorry. It was turned around.

23 So bottom of 219 on 24. Actually, no, no, I'm sorry.
24 218 on line 17.

25 "Q. Did the higher education publishers advise Chegg or Ingram

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"Singh"

1 that Chegg and/or Ingram should inspect any of the cleared
2 books before selling them?"

3 MR. KLEIN: I apologize. I don't have 218.

4 THE COURT: Just flip --

5 MR. GLUNT: Flip the page. I think it was turned
6 around.

7 MR. KLEIN: Yes, I'm sorry.

8 MR. GLUNT: So on page 218, beginning on line 17.

9 "Q. Did the higher education publishers advise Chegg or Ingram
10 that Chegg and/or Ingram should inspect any of the cleared
11 books before selling them?

12 "A. I'm not familiar with a conversation like that.

13 "Q. Did the higher education publishers advise Chegg and/or
14 Ingram that they could sell the cleared books without any
15 further inspection?

16 "A. The books were identified as cleared, and so we put them
17 back into inventory and made them available for additional
18 transactions."

19 MR. GLUNT: Continuing on page 219, question beginning
20 line 24.

21 "Q. Sure. What percentage of books that the higher education
22 publishers inspected from Chegg and Ingram were flagged as
23 suspect?

24 "A. I think that's available in this file here. If you just
25 do an analysis on that, I believe it was less than ■ percent.

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"Singh"

1 "Q. Does ■ percent sound about right?

2 "A. That sounds about right.

3 "Q. Did Chegg do any analysis to see the suspect book rates
4 for any of its suppliers?

5 "A. We did.

6 "Q. And what did it learn from that analysis?

7 "A. That there were varying -- "

8 THE COURT: Line 17.

9 MR. GLUNT: I think it's highlighted on line 13
10 continues the answer.

11 "A. That there were varying rates of suspected books by
12 publisher -- sorry, by partner.

13 "Q. What was the range of rates?

14 "A. Anywhere from ■ to -- I can't recall the high. I want
15 to say probably in the ■ percent range. Again though, the
16 sample size varied dramatically across different -- it may have
17 even been ■ percent. For somewhere there were ■ or ■
18 books. It's a hard thing to compare across because of sample
19 size.

20 "Q. Let's focus for a second on wholesalers. Did Chegg look
21 at the suspect book rates for wholesalers?

22 "A. We did do analysis on that.

23 "Q. And what conclusions did Chegg draw from that analysis?

24 "A. Again, that they were varying rates. We still had the
25 same issues of what the sample size was. Some vendors supplied

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"Singh"

1 a lot more books than others. It also could be a mix of which
2 titles are audited. So again, there's a high-level analysis we
3 can do based off of that.

4 "Q. What was BDB's suspect book rate?

5 A. Again, I think that's in the data set. I believe it was [REDACTED]
6 books out of [REDACTED], so approximately [REDACTED] percent or so.

7 "Q. Does [REDACTED] books out of [REDACTED] sound about right?

8 "A. It does.

9 "Q. Does [REDACTED] percent sound about right?"

10 MR. GLUNT: Question on page 222, line 3.

11 "Q. How about Texas Books?

12 "A. I don't know offhand what their rate was.

13 "Q. Does [REDACTED] percent sound right?

14 "A. If that is what the data says. Again, I don't have that
15 data in front of me right now.

16 "Q. How about Missouri Books?

17 "A. Again, saying there's technical --

18 "Q. Does [REDACTED] percent sound right?

19 "A. Again, I don't know what the exact number was. The data
20 is there and it looks like you've done the calculation."

21 MR. GLUNT: So continuing with the question beginning
22 on page 225, line 2.

23 "Q. So if supplier A supplies Chegg with seven times more
24 counterfeit books than supplier B, that won't affect Chegg's
25 decision going forward as to whether it buys books from

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"Singh"

1 supplier A or supplier B?

2 "A. Based on the representative books that were selected, it
3 is hard to make conclusions around the overall rate.

4 "Q. Why is that?

5 "A. Some books may have a higher rate of counterfeits than
6 other books have. And if we specifically sourced or we -- or
7 the sample included more of those books, then the results would
8 be skewed and it may not be representative of the overall
9 performance of that partner."

10 MR. GLUNT: So continuing on page 226, the question on
11 line 12.

12 "Q. Sure. At this time do you know whether this data is or is
13 not representative?

14 "A. I can't know that. I would have more data if I knew that.

15 "Q. What data would you need to know that?

16 "A. That is an assessment we have to do to determine that."

17 MR. GLUNT: So the question beginning on page 227,
18 line 23.

19 "Q. After the higher education publishers' inspection, did
20 Chegg stop purchasing from any of the suppliers other than
21 Springfield Gardens and south Florida groups which you have
22 previously testified about earlier today?

23 "A. We continue to do business with our wholesale partners.

24 "Q. And am I correct that you testified earlier that Chegg
25 continues to do business with BDB; correct?

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1 "A. Yes.

2 "Q. And Chegg continues to purchase books from BDB because
3 Chegg believes BDB is a good supplier; correct?

4 "A. We continue to buy books from BDB.

5 "Q. If you concluded that BDB was a bad supplier, would you
6 continue to buy books from BDB?

7 "A. We'd continue to do business with BDB.

8 "Q. Why does Chegg continue to do business with BDB?

9 "A. We have an established relationship with BDB. They are an
10 efficient provider of books to us. They are a partner on our
11 side where they buy books from us as well.

12 "Q. If Chegg believed that BDB was indirectly supplying Chegg
13 with counterfeit books, would Chegg continue to do business
14 with BDB?

15 "A. We would not."

16 MR. GLUNT: That completes the Chegg deposition, your
17 Honor.

18 THE COURT: All right.

19 Do the defendants have any other evidence to offer the
20 jury?

21 MR. GLUNT: We do not, your Honor.

22 THE COURT: Do the defendants rest?

23 MR. GLUNT: Yes, your Honor.

24 THE COURT: Do the plaintiffs have any further
25 evidence to offer the jury?

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1 MR. OPPENHEIM: Your Honor, just one thing.

2 One of the witnesses that were on their list that they
3 didn't call, didn't appear, we would just offer a document by
4 that witness as a party admission. We'd introduce and offer
5 PX-254. If you could bring that up for the Court please.

6 THE COURT: Any objection?

7 MR. GLUNT: No objection, your Honor.

8 THE COURT: All right.

9 Plaintiffs' Exhibit 254 is received in evidence.

10 (Plaintiffs' Exhibit 254 received in evidence)

11 MR. OPPENHEIM: Rather than show it to the jury now,
12 we'll just use it in the closing, your Honor.

13 THE COURT: You can publish it if you'd like.

14 MR. OPPENHEIM: Let's publish it.

15 THE COURT: Publish it.

16 MR. OPPENHEIM: Let's go ahead and publish it. And
17 could you, Mr. Cole, focus in on the middle email from Jeff
18 Brady.

19 Is it all right if I read it to the jury?

20 THE COURT: You can read it.

21 MR. OPPENHEIM: From Jeff Brady to Kay Haddox.

22 That is fine. I also manage our fraud department
23 here. It was a shock to me when I started, but fake textbooks
24 is big business. There are operations overseas that make
25 thousands of copies of a single textbook and flood the market,

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1 dropping prices and costing the publishers millions of dollars.
2 The ironic thing is that in some cases the quality of the books
3 are better than the originals, so we can't just go on quality
4 alone. We have some proprietary processes to validate books,
5 but we don't want those to be made public.

6 In this case we determined that the item was likely a
7 copy; but since we cannot prove it, we sent it back to the
8 consumer. In the two years I've worked here, I have dealt with
9 the FBI, Secret Service, NYPD, campus police, USPS postal
10 inspectors and others on fraudulent stolen textbooks. Who knew
11 it was such a popular activity. Thanks again. Jeff.

12 THE COURT: Anything further from plaintiffs?

13 MR. OPPENHEIM: No, your Honor.

14 THE COURT: Do the plaintiffs rest?

15 MR. OPPENHEIM: We do, your Honor.

16 THE COURT: All right.

17 Members of the jury, we've come to a crossroads in
18 this case; the taking of evidence is now complete.

19 We're going to take a very short recess, and then
20 you'll return to the courtroom to hear closing arguments.

21 Please recess the jury.

22 (Jury not present)

23 THE COURT: Any issues?

24 MR. OPPENHEIM: Not from plaintiffs. I just need a
25 few minutes to get organized, if that's all right.

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1 THE COURT: We'll take five minutes.

2 We'll move the podium.

3 Your time is an hour and ten minutes on your principal
4 closing. I'll give you a five-minute warning and gently ask
5 you to begin to conclude your summation. All right?

6 MR. OPPENHEIM: Yes.

7 THE COURT: And then we will take a half-hour luncheon
8 recess, and we'll then proceed with the defendants' closing.
9 And then we will take a ten-minute break between the
10 defendants' closing and the plaintiffs' rebuttal. All right?

11 So we'll take just a few minutes.

12 (Recess)

13 THE COURT: I gave you at least ten minutes.

14 Are you ready? All right.

15 MR. GOULD: One point, your Honor.

16 The Chegg transcript is highly confidential and we
17 just ask that that portion of the transcript be sealed. I
18 would say Chegg would want that, I would suspect, and we have
19 no objection.

20 MR. BHANDARI: We have no objection.

21 MR. OPPENHEIM: It's actually not our request; we just
22 recall that Chegg had asked for that. So we put it forward to
23 the Court to deal with however it sees.

24 THE COURT: We'll deal with it later. It just didn't
25 seem like there's much that's confidential in that at all. But

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Summation - Mr. Oppenheim

1 I'll direct the court reporter to redact from the public
2 transcript the numbers and percentages.

3 Let's bring in the jury.

4 (Jury present)

5 THE COURT: Members of the jury, we're going to turn
6 to one of the concluding phases in any trial, closing
7 arguments. Remember, they are arguments, they are not
8 evidence; they are attorneys' summations. The attorneys will
9 describe to you what they believe has been proved or not proved
10 in the course of this trial that we've all been participating
11 in over the last three weeks.

12 So at this time, members of the jury, I ask that you
13 give your undivided attention to Matthew Oppenheim, Esquire, as
14 he delivers his closing argument on behalf of the plaintiff
15 publishers.

16 MR. OPPENHEIM: Thank you, your Honor.

17 Good morning.

18 THE JURY: Good morning.

19 MR. OPPENHEIM: Almost three weeks ago, I stood up in
20 front of you and I said -- sorry. Let's try this again. And I
21 said that this is a case about a bookseller swarming with
22 counterfeits; a bookseller who had been caught, sued, and
23 settled; a bookseller who had ignored the settlement and
24 ignored the law. And during the course of the last two
25 and-a-half weeks, I believe we have demonstrated for you each

1 and every bit of what I said we would demonstrate.

2 While opposing counsel advocated vigorously on behalf
3 of their clients, their arguments don't withstand scrutiny.
4 Their story is false because they simply can't change the
5 facts. They can deny them, they can ignore them, they can lie
6 about them, and they can distract you from them; but the
7 underlying facts are what they are.

8 My goal during the course of the next hour or so is to
9 discuss eight topics with you: One, the defendants' conduct;
10 two, the defendants' dishonesty; three, the defendants'
11 practices or lack thereof; four, the legal claims; five, the
12 elements of the legal claims; six, the roadmap; seven, damages;
13 and last but not least, let's take a look at the verdict form
14 that you're going to get.

15 I know that it's already been a long two and-a-half
16 weeks, and I will endeavor as best I can to move swiftly
17 through these issues. But I also recognize that this case is
18 critical for the educational publishing community. The issues
19 presented in this case have been festering for literally ten
20 years. And I want to make sure that I equip you with as much
21 critical information as possible before you deliberate.

22 So what are the facts?

23 Defendants have a long history of buying, importing,
24 and selling counterfeits. And unfortunately for the
25 publishers, history seems destined to repeat itself. To this

1 day, defendants are still selling counterfeits. Defendants
2 have repeatedly and recklessly purchased from known counterfeit
3 sellers. They purchased U.S. editions in bulk from overseas
4 sources at too-good-to-be-true prices.

5 Unlike any normal business, they refuse to ask their
6 suppliers where the inventory is coming from or engage in any
7 due diligence to understand who the supplier really is or if
8 those books are lawfully obtained. The defendants willfully
9 closed their eyes and adopt the mantra "I know nothing." We
10 have seen through the course of this trial how this story has
11 played out with respect to Best Books World and the Blackerbys,
12 as well as the Morena books. But we know that it's not just
13 limited to those sellers. We know that the defendants continue
14 to import in bulk from overseas, even now, and they take no
15 steps to know their sources. Indeed, they avoid knowing their
16 sources.

17 Even outside of their mass importation, they've
18 created a business model that encourages counterfeit sales
19 right here in the United States. Whether it's through their
20 buyback websites or the Amazon trade-in program, they again
21 close their eyes to who they are buying from.

22 In the case of the Amazon program, which constitutes a
23 million or so books a year, they never even look at the books.
24 They don't look to see whether the books are counterfeit. And
25 those that are purchased through their own websites, when they

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Summation - Mr. Oppenheim

1 do catch a book that they call questionable, they package it up
2 and they ship it back out again, so that seller can then sell
3 it again. They do this even though their own policy says that
4 they can keep that counterfeit book and not pay for it.

5 So what is defendants' response to all of these
6 accusations? They deny and lie about what they have done; they
7 hide and destroy evidence; they violate court orders
8 instructing them to turn over information. And they tell the
9 world that what they are doing is everything possible; that
10 they are better than almost everybody else out there in terms
11 of fighting counterfeiting. And they claim that it's just
12 inevitable, that counterfeits are not their fault.

13 And why do they engage in this reckless behavior? For
14 money, lots and lots of money.

15 Make no mistake about it, this is not a victimless
16 crime. Publishers, their employees and authors, are all hurt
17 when dirty -- to use the MBS CEO's term -- dirty distributors
18 like defendants decide that it's okay to import and sell
19 counterfeit copies of books into the U.S. marketplace. It
20 hurts students because students don't want books that are going
21 to fall apart; students don't want books that have missing
22 pages; and students don't want books that have wrong
23 question-and-answer sections.

24 It hurts the public, including you, ladies and
25 gentlemen, because without the protection that the law provides

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Summation - Mr. Oppenheim

1 and proper incentives to create educational materials, we all
2 lose out on advancements in research, sciences, and the arts.
3 It's also unfair to other distributors, those distributors who
4 are trying to do the right thing, who are, in fact, doing the
5 right thing, end up having to compete on an unfair, unlevel
6 playing field.

7 Apologies. I've been losing my voice over the course
8 of the last two weeks.

9 Once Mr. Mandel and I or Mr. Bhandari and I are done
10 with our closing arguments, Judge Pauley is going to read you a
11 set of instructions on the law. In this case you're going to
12 hear something extraordinary. The judge is going to tell you
13 that during the course of this case, the defendants violated
14 court orders requiring them to provide information about their
15 businesses. The Court will tell you then that you may infer
16 that the evidence that was withheld would have been unfavorable
17 to the defendants. And you may assume that the defendants'
18 profits were higher than what you saw and heard in this Court.
19 Indeed you can assume that the information generally would have
20 been disadvantageous to the defendants.

21 Ladies and gentlemen, please understand, this is a
22 very serious instruction from the Court. But you will also
23 hear Judge Pauley tell you that during the trial there was
24 evidence that defendants destroyed evidence relevant to the
25 case and failed to maintain records about it. Judge Pauley

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Summation - Mr. Oppenheim

1 will tell you that you may consider that, and that defendants'
2 destruction practices and failure to maintain records is
3 critical. Judge Pauley will tell you that you may consider
4 them when determining whether or not the defendants infringed
5 on the plaintiffs' trademarks.

6 Ladies and gentlemen, please understand, this
7 instruction is also exceedingly rare. The fact that the Court
8 will be giving both of these instructions -- one on destruction
9 of evidence and two on the failure to abide by court orders --
10 is an event that does not typically happen in federal courts.
11 This speaks volumes about the defendants themselves, about the
12 way they conduct themselves and their business. It also speaks
13 volumes about their effort to prevent the plaintiffs from
14 learning about their conduct.

15 Defendants should not get the benefit of having
16 destroyed evidence. Defendants should not get the benefit of
17 hiding information and not complying with court orders. It is
18 up to the jury to listen to the Court's instructions in terms
19 of adverse inferences and make certain that the defendants do
20 not reap the benefit from their improper activities.

21 So let me turn to the next issue.

22 The defendants knew that they should not be doing
23 business with these suppliers. From day one the relationship
24 with Best Books World was fishy. Defendants knew that they
25 were buying books, brand-new U.S. editions, in bulk from

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Summation - Mr. Oppenheim

1 Thailand, and they were buying at too-good-to-be-true prices.
2 Defendants told Best Books World that they would pay her less
3 for brand-new books than they would pay students for used
4 books. Think about that for a minute. Does that make any
5 sense to you? We're going to pay you less for a new book than
6 we'll pay a student for a used book. That's not normal.

7 They also right away recognize these books didn't look
8 right. Their own email says in 2006: You are sending us
9 internationally printed books which have a lesser paper quality
10 and poorer binding than the ones printed here in the United
11 States. Did they ever ask a question? No. They knew the
12 books didn't look right and they just went forward and did
13 business.

14 While the jury heard that the defendants had been
15 called on the mat for selling counterfeits by both Follett and
16 MBS in the spring and summer of 2007, that's not something the
17 publishers knew at the time that they filed their lawsuit in
18 October of 2007. Notably, four days after that lawsuit was
19 filed, there was a critical email sent by Mr. Smyres. Four
20 days after being sued, Mr. Smyres says to Best Books World: We
21 would like to buy more books from you, but at this time the
22 legal issues surrounding the books from Thailand are creating
23 some problems.

24 Why is this important? The lawsuit itself doesn't say
25 anything about Best Books World, the 2007 lawsuit. It doesn't

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Summation - Mr. Oppenheim

1 say anything about Thailand. Mr. Smyres knew that when he was
2 sued on October 2nd, it was Best Books World that was the cause
3 of those counterfeits. And that's what he was telling Best
4 Books World.

5 Literally -- next slide please -- six weeks later,
6 after being sued and after telling Best Books World that he
7 didn't want to buy anymore books from them, they start buying
8 more books. A fair question is, Well, what happened in that
9 six-week period? They said they weren't going to buy books and
10 now they are saying they are going to buy books. They did
11 nothing to determine if the books were legitimate. They didn't
12 get a contract; they didn't ask BBW for its source. They just
13 bought the books. At this point the lawsuit has just been
14 filed; it's just underway.

15 So Mr. Smyres says to Britt Wood, who works for him,
16 that they will not be able to sell the books wholesale. Well,
17 why is that? Well, that's because MBS and Follett, his
18 wholesale buyers, had already complained to him about buying
19 counterfeit books. So he knows if he buys these books and he
20 tries to sell them to MBS and Follett, they are going to turn
21 him in; they are going to catch him. And he knows that won't
22 work.

23 So what does he do? He says, Oh, let me sell them
24 where somebody won't catch them. So he tells Britt Wood, Buy
25 them, but we're going to be able only to sell these on the

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Summation - Mr. Oppenheim

1 Internet.

2 This email could not be more incriminating.

3 Mr. Smyres knew exactly what he was doing. He was shrewdly
4 trying to find a way to continue to profit from counterfeit
5 U.S. edition books coming out of Thailand. He knew that if he
6 sold the books where he had been selling them before, he was
7 caught. So his solution wasn't to stop buying them; his
8 solution was to sell them where he didn't think he'd get
9 caught.

10 Well, the litigation goes on.

11 And just days before the settlement, the settlement
12 that you guys have seen many, many times, Mr. Smyres decides
13 he's going to buy more books from Best Books World. So on the
14 eve of inking a settlement that says that he's not going to
15 import or sell counterfeit books, he's buying more books from
16 Best Books World.

17 Well, when those books come in -- next slide please.
18 When those books come in, there is no doubt about what the
19 defendants say about these books. Here are just three of the
20 emails.

21 Mr. Smyres: We now doubt that any of the books you
22 recently have sent are legitimate copies. No equivocation
23 there.

24 Then he says: We will send all of your books back
25 because I cannot trust that any of them are authentic books.

I44VWIL3

Summation - Mr. Oppenheim

1 Again, no equivocation there.

2 And then he says to his colleague: Tell her she must
3 pay first; tell her these books are counterfeit. Again, no
4 equivocation.

5 He's not saying some of them could be legit; he's not
6 saying, Oh, I don't know. He's saying they are counterfeit.
7 And the reason he tells his colleague Mikeal Van Cleave that
8 she has to pay first is because he doesn't trust her; because
9 he knows what she is. He knows exactly what she is.

10 (Continued on next page)

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I44MWIL4

Summation - Mr. Oppenheim

1 MR. OPPENHEIM: Next slide, please.

2 On September 10, he does disclose, as he is required
3 to, the publishers, that Best Books World appears to be the
4 source of most, if not all, of the pirated books.

5 What does he do then a year later? She comes to him
6 and says she wants to sell books to him again. What does he
7 say? I welcome doing business with you. We are always looking
8 for more books. This is the seller he has repeatedly
9 identified as giving him counterfeit books. I welcome doing
10 business with you. Is that what you do if you are trying to
11 avoid counterfeits?

12 Well, let's talk for a moment about the concept of due
13 diligence. It's a legal term. It's an unfortunate one. It's
14 often defined as the care that a reasonable person exercises to
15 evaluate whether they are going to buy something or do business
16 with somebody. For a normal person, the way you kind of think
17 about that is, I am going to take a look under the hood before
18 I buy the car, right.

19 So the question is, Mr. Smyres, he's a sophisticated
20 businessman. What due diligence did he do about Best Books
21 World? Well, let's see on the first line, it should say May
22 26, 2006. Do we have our dates right here? Mr. Smyres says:
23 In Thailand, might be good to meet and talk re increasing
24 business. Well, the response by Best Books World: Unconvinced
25 to me you because I am oversea. I would like to to business

I44MWIL4

Summation - Mr. Oppenheim

1 with you big lot. Hope to meet you in the next time. He is
2 thwarted the first time.

3 Then he tries to call her. The number he has doesn't
4 work. That should have been a sign. Next time in November of
5 2006 he says he will be in Bangkok until the 18th for an entire
6 week. I buy lots of international editions and would be
7 interested in having an additional supplier. No reply.

8 Next slide. OK. September 2009. I apologize. We
9 have got our dates wrong here. If you look at the blue arrows,
10 that's right. Mr. Smyres says: I welcome doing business with
11 you once again. Maybe we can meet. One of my agents will be
12 arriving today. Maybe he can meet you in the next couple of
13 weeks. No response.

14 A month later, I'm in Frankfurt, October 12 through
15 15, attending the Frankfurt book fair. Maybe we can meet. No
16 response while he's there. And she responds: Now, I am not
17 here in Thailand. In the next time maybe meet you.

18 Well, October 13: I am currently in Frankfurt. If
19 you are here at the book fair, let's meet. No response.

20 November 5. I will be in Thailand for 10 days. Let's
21 meet so we can talk about how we can do more business. No
22 response.

23 April 24, 2010. Are you in Bangkok? I would like to
24 meet? Her response: Sorry. I cannot meet you now. I am not
25 in Bangkok.

I44MWIL4

Summation - Mr. Oppenheim

1 June 2010, I will be in Thailand this coming week. I
2 would like to meet if we are going to do more business.

3 Response: Will let you know again for appointment. I am not
4 sure the certainly time. Again, they don't meet.

5 June 1, 2010. I would like to meet you this week in
6 Bangkok. Response: Sorry. I am inconvenience to meet you.

7 The next year they are at the Frankfurt book fair
8 again. I would like to meet. Her response: I am very busy
9 with my business.

10 October 8, I'm in the Frankfurt book fair. Are you
11 here? If so, maybe we could meet. Response: I must
12 apologize. I'm not in the Frankfurt book fair.

13 November 9, I'm in Bangkok today. Can we meet for a
14 cup of coffee? November 9, sorry. Now I'm not in Bangkok.
15 Finally, where are you?

16 At some point along the way don't you think Mr. Smyres
17 should have said, huh, maybe this person isn't a legitimate
18 business? I can't meet with them. They don't have a working
19 phone number. They are always conveniently not there. You
20 think Barnes & Noble does business this way?

21 Five months later, April 2011, they are going through
22 their inventory at the defendants' warehouse. And Mr. Doenges,
23 who testified, says: I checked out what we got from Ple sales
24 and all of that inventory is long gone. Keep mum about this.
25 Keep mum about this. What normal business sends e-mails around

I44MWIL4

Summation - Mr. Oppenheim

1 saying keep mum about something? A business that knows that
2 they have sold counterfeit inventory.

3 In 2011, the defendants tell Ple at Best Books World,
4 there is a lot of talk about counterfeits coming out of
5 Thailand. If you can produce a publisher invoice, I will
6 consider buying from you.

7 Well, really? How many times did he get counterfeits
8 from her? If she suddenly comes up with something that she
9 says is a publisher invoice that he is going to do business
10 with her again? This is not how a normal business operates.
11 It is the definition of reckless.

12 Let's turn to the Blackerbys. We have talked about
13 the Blackerbys. You have heard evidence. The defendants
14 purchased U.S. editions in bulk from them coming from southeast
15 Asia. They bought them at too good to be true prices. Here,
16 too, they did zero due diligence.

17 What did Mr. Smyres say on the stand? He said, well,
18 the Blackerbys told me that they had been selling a hundred
19 million dollars, or something like that, to Follett. Wow.
20 That's the kind of boast that you hear with kids in a locker
21 room. That's not how people do due diligence. They don't just
22 listen to somebody and say, I do a hundred million dollars
23 worth of business with Follett and take somebody's word for it.
24 But that's what Mr. Smyres did. That's not due diligence. But
25 he kept buying from them.

I44MWIL4

Summation - Mr. Oppenheim

1 And he bought from them with an internal name that was
2 a code name, ABB, Aussie Book Buyers. We have talked about
3 this. The Blackerbys were boys from Alabama, not from
4 Australia.

5 Why did they use a code name? Well, the defendants
6 claim that the reason they were using a code name was because
7 they didn't want Follett to find out that the defendants were
8 selling to them or that the Blackerbys were selling to them.

9 Let's pause for a minute and let's talk about that.
10 You heard both -- I think it was Mr. Dimm and Mr. Smyres
11 testify that they don't reveal sources. In their industry
12 suppliers don't tell their customers where they got their
13 books. OK.

14 Let's for a moment take that at face value, though
15 it's an absurd proposition. Let's take that at face value. If
16 that's the case, Follett is never going to ask the defendants
17 where they are getting their books, and certainly the
18 defendants are never going to tell Follett where they are
19 getting their books, so there is no need to use a code name
20 internally. You could put the Blackerbys on it. Follett is
21 not going to find out. You use a code name because you don't
22 want other people internally to know that you are dealing with
23 a supplier who was previously sued for distributing counterfeit
24 books.

25 Well, in February of 2011, the walls finally come

1 crashing in on the defendants. One of their customers returns
2 some counterfeit books and the defendants immediately know that
3 those counterfeit books had been sourced from the Blackerbys.

4 Now, at this point in time the defendants did not have
5 a system in place which uniquely identified every book. So
6 they couldn't look at the book, scan some bar code say, we got
7 these from the Blackerbys. They just knew that they had got
8 them from the Blackerbys. That's how book distributors and
9 book sellers know where they source their books.

10 And they immediately sent an e-mail to the Blackerbys
11 acknowledging that they had counterfeit books and it was more
12 than just the 20 books that that one customer had sent back.
13 They discovered that there are way more. This is just one of
14 the e-mails that you saw talking about their shipping
15 counterfeit books back to the Blackerbys. Multiple titles.
16 They don't equivocate here. They don't say, well, maybe they
17 are counterfeit. They say they are counterfeit. They say they
18 compared them to original Cengage copies and determined that he
19 were counterfeit.

20 In fact, you may recall that one of the witnesses
21 said, well, at first he didn't realize they were counterfeit.
22 They looked legit. You actually saw e-mails on this. I think
23 the books are legit. But then he orders legitimate copies from
24 Cengage, does a comparison. Oh, yes, they are counterfeit.
25 Does that multiple times. Really demonstrates the value of

1 using an exemplar.

2 Anyways, the defendants simply ship these books back
3 to the Blackerbys. And you heard from the Mark Blackerby
4 testimony that was read to you what Mark Blackerby with those
5 books when he got them back. He said he sold them. He went
6 online and he sold them. That's why book distributors should
7 not ship counterfeit books back to their supplier.

8 Well, having received lots and lots of counterfeit
9 books from the Blackerbys, what do the defendants decide to do?
10 Do they say, oh, I am going to stop doing business? No. They
11 double down. Here is their e-mail from Mr. Cahill where he
12 says: Perry is planning to increase the quantity of books
13 coming to us this year. He says that he's working with the IT
14 department to make ordering faster.

15 Now, the defendants testified, well, it wasn't of the
16 plaintiff publisher's books. Look at this e-mail. The e-mail
17 says: Pearson, McGraw-Hill, and Cengage. All three of them
18 are plaintiffs here. And, in fact, they did continue to do
19 business with the Blackerbys, even after receiving counterfeit
20 books from them.

21 Then what did they do? Well, then they decide that
22 they are going to hatch a secret deal with the Blackerbys.
23 They send this e-mail that they have acknowledged that they are
24 trying to limit the amount of people that know about the people
25 and they suggest, maybe we should use false names in the deal.

1 I ask you again, is this what a normal business does,
2 or is this a business that's trying to hide what it's doing?

3 The defendants' response in their testimony to this
4 was, no, no, no. We were just trying to sell books and not
5 have Follett know who was selling them. Even if that's true,
6 which doesn't appear from the e-mail that it is, they are still
7 deceptively trying to hide who is selling books to who. Again,
8 that is not what a normal business does.

9 The defendants know that they have been shipping
10 counterfeits and, in fact, one of the e-mails that just slaps
11 you in the face about this is one that was sent by Mike
12 Ingledue. In June of 2011, talking about Texas Books, he says
13 to Mr. Smyres, I do have a really good shipment going to them
14 next week. I mean, really good, no counterfeit.

15 He knows that some shipments are counterfeit and some
16 aren't. The defendants' testimonial response to this e-mail
17 is, no, no, no. Really good meant it was going to be
18 profitable, make a lot of money. I have no doubt that it was.

19 But that doesn't change the fact that Mr. Ingledue
20 recognized that this was a shipment that wasn't going to have
21 counterfeits. If you are a business that thinks you don't ship
22 counterfeits, why would you ever have to have an e-mail that
23 says no counterfeits? Because the assumption would be they
24 always have no counterfeits. But, in fact, they know when they
25 are shipping counterfeits and they know when they are not

I44MWIL4

Summation - Mr. Oppenheim

1 shipping counterfeits, and that's exactly what Mike Ingledue
2 was saying in this e-mail. We have a shipment now. This one
3 doesn't have counterfeits. Can we send it?

4 How does Mr. Smyres feel about this issue of
5 counterfeits? He made that clear in his e-mail. Mr. Smyres'
6 view is that this is just an unfortunate problem that from time
7 to time occurs in this business.

8 This is emblematic of the issue, ladies and gentlemen.
9 This is not just an unfortunate problem. This is illegal.
10 This is improper. You don't get to just say, oh, it happens.
11 The defendants have an obligation to not import or sell
12 counterfeit books, period. They don't get to say, well, it
13 just happens from time to time.

14 The guy who is selling TVs out of the back of a van,
15 if he gets caught, do you think he gets to say, it just happens
16 from time to time that the TVs are stolen? He doesn't. When
17 you engage in illegal conduct you have an obligation to stop
18 it, and Mr. Smyres doesn't understand that.

19 Let's talk about Mr. Smyres and the defendants'
20 dishonesty. You will recall that the 2008 settlement agreement
21 requires the defendants to disclose that they had sourced
22 counterfeit books. We have talked about these disclosures at
23 length. I want to dig in on this for a minute because that
24 first disclosure was sent on August 11, and that first
25 disclosure says nothing about Best Books World.

1 But we just saw in e-mails a moment ago Mr. Smyres
2 sending e-mails to Best Books World repeatedly saying that the
3 books that he had received from them were counterfeit. So
4 weeks before he sends this disclosure to the plaintiffs, he is
5 already telling Best Books World that he is getting counterfeit
6 books from them yet again and, yet, his first disclosure to the
7 publishers doesn't mention Best Books World as a source of
8 counterfeit books.

9 So the publishers come back and say -- you can see
10 right here, the August 1, 2008 e-mail predates the August 11
11 e-mail. He knew absolutely that he was getting counterfeits
12 from Best Books World.

13 Let's turn to the second disclosure. So after the
14 publishers complain about the first disclosure as being
15 inadequate, defendants send the second disclosure and he says
16 Best Books World source most, if not all, of the pirated books.
17 We heard testimony during the proceeding that Mr. Smyres
18 thought that Wirat was also sending counterfeit books. But
19 Wirat in this disclosure is not disclosed as a source of
20 counterfeit books. They just said there are no more invoices
21 provided. If Wirat was a source of counterfeit books, he
22 should have disclosed it.

23 Let's turn to the third disclosure, the unsent
24 disclosure. Mr. Smyres testified that this unsent disclosure
25 should have been sent. He said, I don't know 100 percent, but

I44MWIL4

Summation - Mr. Oppenheim

1 I assume so, about it's being sent. But you heard John Garry,
2 Lisa Suarez, and Richard Essig all testify unequivocally that
3 the publishers had never received this disclosure. It was only
4 found during the course of this litigation.

5 What is the defendants' explanation for buying books
6 from Best Books World in 2008, in July of 2008? So what
7 Mr. Smyres said is, well, he had just signed an agreement and
8 it gave him the right to send copies of the books to publishers
9 to have them checked out. And he said he thought that they
10 would be able to inspect them as well.

11 Well, before he ever sends anything to the publishers
12 he says to Best Books World, we now doubt that any of the books
13 that you recently sent are legitimate copies. So he knows
14 absolutely that the books that he had received in July 2008
15 were counterfeit. And, yet, his response to Best Books World
16 is, I am going to send them back -- I am going to send them to
17 the publishers unless you agree to give us a refund. Best
18 Books World says, well, no.

19 What does he do? He sends them to the publisher, but
20 he only sends three. He only sends three out of nine titles.
21 Two are confirmed counterfeit. The third he is told it's
22 likely counterfeit.

23 And what does Mr. Smyres do? He doesn't send all of
24 them back. He only sends part of them back. And Mr. Smyres'
25 explanation for that on the stand during this trial was, well,

I44MWIL4

Summation - Mr. Oppenheim

1 I thought some of them were authentic. That's what he said.
2 That's what he testified to. That's entirely contrary to his
3 e-mails where he repeatedly said he didn't think any of the
4 books were authentic. So that's just a new story that he has
5 put forward now.

6 Then we heard another witness get up and say,
7 sometimes we don't get the number of books shipped that we
8 ordered. The orders are often not fulfilled the way they are
9 supposed to be. Did we see a single e-mail during the whole
10 course of all these e-mails, all the back and forth on this
11 July 2008 e-mail, did we see a single e-mail which said, by the
12 way, you didn't ship us what you told us you were going to ship
13 us? No. Not a single one.

14 Let's turn to the Blackerbys. Mr. Smyres testified
15 that he never knew that the Blackerbys had been sued by the
16 publishers for selling counterfeits. The testimony is right
17 here:

18 "Q. You knew he was sourcing from overseas, but you never
19 asked him from whom you were getting the books, right?

20 "A. No, I never did that.

21 "Q. And he never told you from whom he was getting the books?

22 "A. No.

23 "Q. And you never bothered to check whether the Blackerbys had
24 been sued, is that right?

25 "A. No, I didn't check."

1 Well, let's compare that to Mark Blackerby's testimony
2 that was read to you; Mark Blackerby, who doesn't have a stake
3 in this litigation:

4 "Q. So you knew that Mr. Smyres had previously been sued for
5 copyright infringement by the book publishers?

6 "A. At some point during our relationship that came out.

7 "Q. And, similarly, he was aware that you and your brother,
8 Perry Blackerby, had been sued along with a bunch of others by
9 the book publishers for copyright infringement?

10 "A. At some point during our relationship that came up.

11 "Q. So you knew that the other had been sued at some point in
12 time for copyright infringement?

13 "A. That is correct, sir."

14 Those two sets of testimonies, one of them is not
15 right.

16 After the publishers send a cease and desist letter to
17 the defendants, what do they do? They deny, deny, deny. You
18 saw each of the different letters that were sent by defendants'
19 counsel to the publishers. They knew they had counterfeits
20 they had been pulling off their shelves, they had customer
21 complaints, they had been terminated by their wholesalers.
22 They knew all about this.

23 What do they say to the publishers? My client is
24 unaware of selling or otherwise distributing any pirated or
25 otherwise unauthorized copies of any books whatsoever.

I44MWIL4

Summation - Mr. Oppenheim

1 Couldn't be more false. Their own e-mails say they imported
2 them. They sold them. And they did that not once, but four
3 times.

4 Mr. Smyres then testified, well, we don't actually
5 import the books. Well, let's think about that. Mr. Smyres
6 was then showed a PIERS report. And that PIERS report shows
7 his company, S Rock Paper Imports, which he indicated in his
8 testimony was created exclusively for the purpose of importing
9 books, repeatedly was importing books from Bangkok during the
10 period of time of 2008 to 2010. And this is just one snapshot.
11 So Mr. Smyres' testimony that they are not importing is not
12 true.

13 We heard testimony about Follett terminating the
14 defendants' accounts. But what was the defendants' response to
15 Follett? Well, they had a phone call. And during that phone
16 call Mr. Gordon said: Our account, as well as Buckeye's, is
17 being cancelled. I told him, Follett, probably didn't know
18 that they were counterfeit. He seemed to question that, since
19 other buyer had sent them books that they supposedly got from R
20 us, Textbooks R Us, that were also counterfeit.

21 Their response to Follett is, we probably didn't know
22 they were counterfeit. Did Follett believe that? No. Well,
23 they then have a formal back and forth, more lawyerly. Both
24 Follett and Texas Book had sent legal letters, reached out to
25 the defendants to say, you had sent counterfeit books.

1 What did the defendants say in response to that?

2 Mr. Smyres wrote the e-mail. He says, I was dismayed by your

3 remarks. Dismayed? Again, he knew he had been selling

4 counterfeits. He pulled them off his shelves. He had imported

5 them. He had returned them. And he tells Follett in Texas

6 Books, I was dismayed.

7 Then he says, we vigorously examine every shipment of

8 purchased books before distribution in order to determine the

9 product's quality and origin. Well, we heard lots of testimony

10 about the defendants' inspections and we are going to talk

11 about that in a few minutes. But just recognize, this e-mail

12 was sent, this letter was sent July 5, 2011. And defendants

13 testified that they didn't even start the formal inspection

14 process until 2013. So here he is telling Follett and Texas

15 Book, we inspect everything. But that wasn't true.

16 Mr. Smyres at this point says to Best Books World, we

17 can track each and every book you sold to Textbooks R Us. This

18 is an interesting claim because, again, they don't have any

19 identifiers on the books. Let's take him for his word at it.

20 And what was the response by Ple? Next slide, please. You buy

21 books from many sellers. I cannot responsible, but I am sure

22 all my books are not responsible.

23 Well, she is saying, well, you could have gotten those

24 from other people. This is key because this defense by Best

25 Books World is exactly what Mr. Smyres and the defendants have

I44MWIL4

Summation - Mr. Oppenheim

1 said to Texas Book, has said to Follett, that has said to this
2 jury in this court. He didn't buy it when it came from Best
3 Books World and you shouldn't buy it when it comes from him.

4 Let's talk about destruction. The 2008 settlement,
5 Mr. Smyres' testimony was that there was leftover inventory
6 after the 2008 settlement and he was told by the publishers to
7 destroy that inventory, and that's why he destroyed inventory
8 later in time. That was interesting testimony because Richard
9 Essig, who took the stand, the gray-haired gentleman from
10 Pearson who has been with the company for 460 years, I think.
11 Joking. Mr. Essig says:

12 "Q. Do you recall ever telling a distributor to destroy
13 counterfeit testimony?

14 "A. No, I don't recall.

15 "Q. To your knowledge, have you or the publishers with whom
16 you worked together on enforcement ever instructed the
17 defendants to destroy books in their possession that are
18 counterfeit?

19 "A. No, not to my knowledge."

20 One of these two individuals is telling the truth.

21 Let's turn to the larger issue of the destruction of
22 evidence. There are five different destruction events. I know
23 you have heard a lot about destruction during this trial, but
24 let me try to break it down for you.

25 The first one is July 2011 destruction of the books

I44MWIL4

Summation - Mr. Oppenheim

1 that had been put in the barn. The second is May 2012, the
2 destruction of the books that had been leftover in the barn.
3 You heard about that from Mr. Davenport's deposition this
4 morning. There is the early 2013 destruction of two carts of
5 books. There is the April 2013 policy that they are just going
6 to destroy. And then there is destruction of a book at issue
7 in the case in October 2016.

8 Let me break those down quickly for you. In July of
9 2011 -- it's important to understand how this evidence comes
10 together here, and this is one of those instances where you
11 hear evidence from different people and the timeline doesn't
12 necessarily come out clearly. Let's put it together here now
13 because it's very clear.

14 The defendants claim they destroyed the evidence, the
15 books, the counterfeit books, on July 11, 2011, and they say
16 that they had not been on notice yet. They didn't know. Well,
17 that's not true because on June 29, two days before the
18 destruction, they get an e-mail from Mark Blackerby saying that
19 Perry Blackerby is meeting with the publishers about
20 counterfeit books and that Follett had turned him in.

21 The defendants know that Follett has counterfeit books
22 from them. Follett has raised the issue with them. What did
23 the defendants think? It's obvious what they think. Follett
24 is going to turn us in. Perry Blackerby is going to turn us
25 in. We have got all these books that we have put in the barn.

1 We better get rid of them. And that's what they did.

2 What their testimony was, well, we didn't want them to
3 be sold, so that's why we destroyed them. The books were
4 already in the barn. They weren't selling out of the barn.
5 Why did they have to then destroy them? We could reasonably
6 ask the question, why did they put them in the barn in the
7 first place, which is a question I will ponder for many years.
8 I expect that what happened is, they wanted to hide them. But
9 we don't know. What we do know is their excuse for taking them
10 to the dump and destroying them does not hold any water.

11 Mr. Mandel in his opening statement said, look at
12 these pictures. Is this something that a business would do if
13 they were trying to hide it? I suppose. But that's not what
14 Mr. Davenport said in his testimony. You heard this morning, I
15 took the pictures because I was destroying the books in a way
16 different than what Mr. Smyres had told me to do. Mr. Smyres
17 had told him to pour water over the books, and he had decided
18 instead to take them to a dump and run over them. That's why
19 he took the pictures of them, not because they wanted to have a
20 record that they had done something that was righteous.

21 The defendants receive the cease and desist letter
22 from the plaintiffs in August of 2011 and they know they have
23 to preserve evidence.

24 What happens then? We heard about this this morning
25 from Mr. Davenport. Roughly eight months after the cease and

1 desist letter comes, Davenport testifies that when he is called
2 by Mr. Smyres -- excuse me. The defendants realize that they
3 have failed to destroy all the books. Several boxes of the
4 books were left in the barn. We heard the unfortunate story of
5 Mr. Davenport's son trying to sell some of them back to
6 Mr. Smyres' store.

7 But what happens then is really interesting. Because
8 Noah Davenport didn't take all the books to the bookstore, so
9 there were still boxes left in the barn. They know --
10 Mr. Davenport testified he knows that they at this point have
11 been sued. He doesn't mean sued. He really means they
12 received a cease and desist letter. He knows there is a
13 litigation threat from the publishers. He testified to that.

14 What does he do with those two boxes of books? He
15 throws them away. Now, does he do this without talking to
16 Mr. Smyres? No. He testified that he called Mr. Smyres and
17 Mr. Smyres' reaction was, he was really upset and he was really
18 upset because of the publishers. That's what Mr. Davenport
19 said. Mr. Smyres knew that the publishers had sent a cease and
20 desist letter and he realized that the fact that those books
21 had not been destroyed was a problem for him. And then
22 Mr. Davenport testified that Mr. Smyres was happy when he
23 learned that the rest of the books, those extra boxes, had been
24 thrown away.

25 So in 2013, the defendants actually articulate what

I44MWIL4

Summation - Mr. Oppenheim

1 their destruction policy is. They basically say whether
2 buyback or bulk, if it looks counterfeit, they set it aside and
3 destroy it. That's what they have in writing.

4 They took the stand and they said something different.
5 They say, no, no, no, we don't really mean that. That wasn't
6 really our policy. But there are no e-mails to support that.
7 It's just them orally getting up and saying that. What we do
8 have is written testimony. Remember what I said at the
9 beginning of this case. This case is about what the defendants
10 did, not what they say. This e-mail is what they did, not what
11 they say.

12 There were then two other instances of destruction.
13 In 2013, you saw an e-mail where the defendants had a very fake
14 book and Mr. Cahill says, can you keep it? I want to see it.
15 The response is, it's already been disposed of. That's long
16 after the publisher's cease and desist letter.

17 Then in 2016, they actually destroyed a title which is
18 at issue in this case. Their response is, oh, it was somebody
19 else's, some company called Bookfari, whoever that is.

20 Do you think if it's in their possession and they have
21 been sued for counterfeits on that title that they should be
22 permitted to just destroy it and say, oh, it wasn't ours?

23 Why does destruction matter? Destruction matters
24 because that's evidence, evidence that the defendants denied
25 the plaintiffs, evidence regarding the potential importation

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Summation - Mr. Oppenheim

1 and sale of counterfeits. We don't know what they destroyed.
2 We can't. They didn't keep a log. By the way, who does that?
3 You've got a complex inventory system. You've got to know
4 what's on your shelves if you are running a business like this.

5 If you are pulling books off the shelf and destroying
6 them, what are you doing in your computer system? You can't
7 just take hundreds and hundreds and hundreds of books out of
8 your inventory system, not put it in your computer and think
9 that's going to work. But they say they kept no logs, so we
10 have no record of what was destroyed. They believe, well,
11 that's too bad. That's why there is an adverse inference
12 instruction being given to you because you get to presume that
13 they denied us critical evidence.

14 I want to talk about their training. The defendants
15 have made a big deal about training. Frankly, I can't figure
16 out what their story is. On the one hand they say, we can't
17 tell if a book is counterfeit. We are not experts. How many
18 times did we hear that over and over again? That's why we
19 called them questionable. We are not experts. If a
20 counterfeit book got through, it's not our fault because how
21 could we possibly tell? Mr. Mandel stood up in front of you in
22 the opening statement and said, can you tell? He couldn't
23 possibly tell. Then Mr. Dimm gets up and he literally gave you
24 a lesson on how to identify a counterfeit book. Which is it?
25 Can you tell or can't you tell?

1 It's convenient for them to have both stories because
2 the first story let's him say, it's not our fault if it gets
3 through. And the latter story that they do know is we do
4 everything possible. You can't have it both ways.

5 Let's skip ahead, please, to slide 53, outreach. I'm
6 apparently running short on time.

7 Defendants claim that they reached out to the
8 plaintiffs and they really, the Blackerbys, they really wanted
9 help. They offered to let us into their warehouse. They
10 wanted help, they wanted help, they wanted help. We heard that
11 over and over from Mr. Smyres.

12 You heard several things here. One is in a settlement
13 agreement that a right to send books and to be identified as
14 counterfeit. They did that once. Once. Never again. They
15 had the right to do it even outside of the settlement agreement
16 because you heard all kinds of other distributors do that all
17 the time.

18 And then you saw a critical letter from the plaintiffs
19 that the defendants didn't show you and that was this April 26,
20 2013 e-mail to their counsel. This is literally a step-by-step
21 process of the things the defendant should be doing to avoid
22 counterfeits. They should understand the true source of the
23 books they buy. They should do due diligence, like any
24 legitimate business. They should not be surprised when they
25 get pirate product when they buy at below-market pricing. They

1 should ask suppliers for documentation to demonstrate the
2 legitimacy of the product. Nothing is shocking in here. But
3 to the extent that the defendants are saying they got no
4 guidance, it's here. If they had followed these instructions,
5 they probably wouldn't have the problems they have now.

6 Now, the defendants say, you know, the best practices
7 are a recent occurrence. We are going to talk about the best
8 practices in a minute. But these principles in this letter in
9 2013 are very similar to the best practices. The defendants
10 were told what to do. And, by the way, the defendants were
11 told that the plaintiffs would be happy to come to work with
12 them in their warehouse if they would start by identifying
13 their overseas shipments for us to inspect first. The
14 defendants didn't want to do it that way.

15 Let's turn to the defendants' practices. The
16 defendants do have policies and procedures on how they should
17 deal with counterfeits. It's PX 288. It's got their masthead
18 and how to tell it's counterfeit. It starts with the sentence:
19 These policies and procedures clarify and memorialize the
20 company's existing policies and procedures.

21 Let's talk about those policies and procedures for a
22 minute, please. The policies and procedures say they should
23 remove questionable books from the book stream. They don't do
24 that. The policies and procedures say they should make a
25 good-faith effort to know from whom they are buying. They

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Summation - Mr. Oppenheim

1 certainly don't do that. It says that they should maintain
2 true name and address of sellers. They don't do that. It says
3 they should exercise due diligence to avoid purchasing from
4 sellers likely to sell counterfeits. Boy, they don't do that.
5 It says that they should inspect books upon arrival if from a
6 source other than the publishers. They try to do that. They
7 don't do it right because they don't compare to an exemplar
8 when it comes in, but they try. It says they should ask
9 sellers questions to be comfortable with their sourcing. They
10 don't do that. They should obtain a certificate of marketable
11 title or agreement. Books are legitimate. The defendants'
12 testimony on that was, that's not a useful document because if
13 somebody is going to sell any counterfeit books, they are going
14 to send in counterfeit books, whether they sign it or not.
15 That may be true, but this is their policy. We didn't write
16 this. They did. They are not abiding by their own policy.
17 They say their own policy doesn't make sense. And then it says
18 consult the publishers if in doubt. They don't do that.

19 Let's turn to the best practices. Best practices.
20 The publishers have worked with the rest of the industry to
21 promulgate it. Almost everybody else you have heard is getting
22 on board and adopting the best practices. They are simple
23 concepts in these best practices. The defendants will not
24 adopt them. Simple things that says, because of the risk of
25 obtaining counterfeit increases when acquiring inventory from

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Summation - Mr. Oppenheim

1 anonymous sellers, you should require accurate identifying
2 information. You heard that this counterfeiting problem is
3 continuing and you saw the letters that have been sent
4 recently.

5 I'd like to turn to the legal claims, please. So,
6 there is a breach of contract claim in this case. The Court
7 has already found there is a binding contract. The issue is
8 whether or not defendants violated their promise not to import
9 or sell or assist others to import or sell pirated editions of
10 plaintiffs' textbooks. I believe this one will be easy for
11 you, ladies and gentlemen.

12 You are also going to be asked to come to a verdict on
13 copyright and trademarks trademark claims and the elements that
14 the plaintiffs have demonstrated is, we own -- the Blackerbys
15 own or have exclusive license to all of the copyrights or
16 trademarks. They have registered them and shown that the
17 defendants have imported or sold counterfeit copies of these
18 titles or reproduce their trademarks. We do not have to prove
19 that they had knowledge or intent with respect to these claims.

20 You will be asked to decide whether their infringement
21 was innocent, normal or willful on the copyright side or just
22 normal or willful on the trademark side. There is no such
23 thing as innocent infringement on the trademark side.

24 The innocent infringer provision, you will find out,
25 does not even apply in the copyright situation. Because if the

1 copyright owners put a registration mark on the book and the
2 defendants had access to it under the law, they don't get the
3 benefit of innocent infringer defense. So that will be easy
4 for you.

5 The question is whether their conduct was willful. I
6 think that you will find this is easy because willfulness is
7 defined as did they act intentionally, did they act with
8 reckless disregard, or did they act with willful blindness?
9 And I think all three of those are met.

10 The statutory damages ranges that you will be allowed
11 to assess from the copyright side will be between 750 to
12 \$30,000 per title. Not per book, not per case; per title. And
13 if you find that it's willful, that \$30,000 ceiling goes up to
14 150,000. If you find it's innocent, you can go down to 200.
15 On the trademark side you get to assess between a thousand and
16 200,000. And if you find that it's willful, it goes up to \$2
17 million per mark.

18 I believe that there will be little doubt in your mind
19 that the plaintiffs have demonstrated that they own the
20 copyrights and trademarks in this case.

21 Let's turn to the roadmap, please. The evidence of
22 defendants' infringement is extensive. Plaintiffs have put
23 forward evidence that includes direct purchases from the
24 defendants, defendants' own inventory, defendants' wholesale
25 customers, defendants' individual customers, and defendants'

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Summation - Mr. Oppenheim

1 suppliers.

2 The defendants will erroneously want you to look just
3 at the specific books in this case. Those books are just
4 examples. The question is, did they distribute a counterfeit
5 copy of that title? The plaintiffs could succeed on their
6 claims without having a single book in this courtroom if we had
7 evidence to show that it was more likely than not that the
8 defendants had distributed a counterfeit copy of that title.

9 Let's talk about more likely than not. The Court has
10 already and will instruct you more on the issue of
11 circumstantial versus direct evidence, but understand this.
12 There is no greater weight to direct evidence than there is to
13 circumstantial evidence. Where there is smoke there is fire.
14 Smoke is as much evidence as fire is. If the defendants say,
15 they can't show a sales receipt or they can't show a witness
16 who saw a book being distributed, we don't need that direct
17 evidence.

18 We have talked about the preponderance of evidence
19 standard. It means more likely than not. Do we have a
20 feather's worth more evidence than the defendants.

21 Let's go to the buckets, please. The defendants put
22 forward roadmap buckets. They had five different buckets.
23 Here is what's interesting about this is that they have these
24 five buckets and they have got all their evidence. Did you
25 hear a single witness for the defense get up and say, we did

1 not import or distribute a counterfeit copy of that book? Let
2 me say that again. They didn't have a single witness testify
3 that they didn't do it. So all they want to do is say, you
4 didn't see a receipt for this, you didn't see a receipt for
5 that.

6 Let's go through it. Let's start at their fifth
7 bucket. When they first put this on in their opening statement
8 and they called it titles with any evidence, I didn't
9 understand what they meant. What they really mean is titles
10 with evidence. They are acknowledging for these 43 titles,
11 there is evidence.

12 Let's just move on. Let's go to the second bucket.
13 Excuse me. The fourth bucket. These are titles that are found
14 in multiple inventories. There are 35 titles in this bucket.
15 Slide 93, please, or thereabouts. Let's look at a couple of
16 examples of this. Let's start with title 20. This is an
17 example of one of these books. This is a book, International
18 Economics, where two plaintiffs -- there are two purchases by
19 the plaintiffs from the defendants.

20 Are we at Title 20, please.

21 Child Family School Community Socialization and
22 Support. There is three critical pieces of information here.
23 MBS turned over a copy, counterfeit copy of this book. Follett
24 indicated they had received a counterfeit copy of this book
25 from the defendants. And the defendants had a copy in their

1 possession. You see that Best Books World sold them 638 copies
2 and sold them new for 37.31, pretty low price. Here, they
3 reported that they purchased 652, but they sold 808. That
4 doesn't make a lot of sense, but let's move on.

5 Let's go to another title, please. Title 45. This is
6 another example of this bucket. Here, again, there were books
7 found in the defendants' possession and Mr. Blackerby, who had
8 been selling the books to the defendants, had counterfeit
9 copies in his possession. By the way, there are e-mails,
10 defendants' customer identified and returned 20 alleged
11 counterfeits purchased from defendants. They have e-mails
12 where their own customer returned counterfeit copies. So they
13 want to say, there is not a shred of evidence here. Their own
14 e-mails show it. Again, they bought copies from Blackerby.
15 who we all know at this point was a counterfeit source.

16 Let's go to the next bucket, please. Titles found in
17 third-party inventory. Let's look at a couple of examples of
18 this. These were books that were turned over from their
19 customers. So MBS turns over a book. It's a counterfeit copy.
20 Let look at this. So they bought from Best Books World, Ple
21 sales, and Blackerby large quantities. That alone is enough.
22 They imported from a known counterfeit source this book. But
23 then you see that they sold it to MBS, right, shortly after the
24 purchase, and then MBS turned it over to us. They want to say,
25 you can't show it was the exact same book. Is it more likely

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Summation - Mr. Oppenheim

1 than not that that book came from the defendants? I think
2 there is no question that it is.

3 Next. Let's look at another one, Modern Radio
4 Production. This one was turned over also by MBS and this is a
5 book that -- Blackerby, when he settled with the plaintiffs,
6 turned over counterfeit copies. Here it shows they bought from
7 both Best Books World and Blackerby, and they bought on
8 December 23, 2010. They sold three months later to MBS. MBS
9 turns over a counterfeit copy. Defendants want to say, there
10 is no receipt that shows that specific book. It came from the
11 defendants. Is it more likely than not? Of course it is.

12 Let's go to the next bucket, please. Let's take a
13 moment. Let's talk about what Follett said. You heard
14 Follett's testimony. And that Follett testimony was telling.
15 Follett was asked:

16 "Q. So you know for a certainty, at least, that many came from
17 used book exchange were counterfeit?

18 "A. Yes.

19 "Q. Was there a past history of significant infringement?

20 "A. Yes.

21 "Q. And beyond the history of infringement, you know for
22 certainty that some of the counterfeits book that you had
23 received in 2011 had come from the defendants' accounts, is
24 that right?

25 "A. Yes."

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Summation - Mr. Oppenheim

1 Is it more likely than not that these books came from
2 the defendants? Of course.

3 Let's talk about what MBS said. They were asked the
4 question:

5 "Q. Mr. Daniel, you know for a certainty that Mr. Smyres and
6 his companies have provided some counterfeit books to MBS,
7 right?

8 "A. I believe that is true, yes.

9 "Q. And that's why you viewed Mr. Smyres and his business as a
10 risky buyer, risky suppliers, right?

11 "A. Correct.

12 "Q. And the reason that Mr. Schuppan thought that Mr. Smyres
13 was dirty was because of those facts, right?

14 "A. I believe so.

15 "Q. And when Mr. Schuppan used the term dirty, you understood
16 that to mean that Mr. Smyres and his companies were likely
17 supplying counterfeit books, right?

18 "A. Possibly supplying counterfeit books, yes."

19 Let's go to the second bucket. These are the books
20 that were found in defendants' possession that were
21 counterfeit.

22 Let me give you an image for a minute. I just bake a
23 batch of cookies. I put them in a cookie jar. I leave them
24 out. I have a kid. Kid got a sweet tooth. Kid has got a past
25 history of stealing cookies. I go down to the cookie jar and

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Summation - Mr. Oppenheim

1 the kid is sitting there. There are only two cookies left in
2 the cookie jar and there are crumbs all over the kid's face.
3 What am I going to think? I know my kids. My kid ate the
4 cookies.

5 Mr. Smyres and the defendants are sitting in
6 counterfeit books and they want to say, well, we didn't
7 distribute them. You saw the records. Did they buy those
8 counterfeits in ones and twos? No. They bought them in bulk.
9 If there was one, two, even 10 left, that was not all they
10 imported and all they sold.

11 THE COURT: Mr. Oppenheim, please begin to conclude
12 your summation.

13 MR. OPPENHEIM: The five books for which there is no
14 counterfeit book, those are the best. Those are the ones where
15 the e-mails show Mr. Smyres sending the counterfeit books back
16 to Ple in July 2008. So defendants say there is not a shred of
17 evidence. I think when you admit that you imported, sold, and
18 then sent back counterfeit books, that's a shred of evidence.

19 We had a classic battle of the experts in this case.
20 We had two financial guys get up and disagree about numbers.
21 They agreed about two numbers, however. One, they agreed on
22 the defendants' revenues. For the period 2008 to 2016,
23 revenues of \$783 million. That's a boatload of money. This is
24 not a mom-and-pop shop. This is a business that can't say, you
25 know, we don't have policies and procedures. We don't do

1 things that way. You make that kind of money, you got to run a
2 legitimate business.

3 The other figure that they didn't dispute was
4 Mr. Smyres' salary and profits, \$47 million between 2008 and
5 2016. Experts didn't disagree on that. As you consider what a
6 just amount of damages is, we ask that you consider whether
7 it's appropriate for Mr. Smyres to do business the way he does,
8 destroy evidence, flout court orders, and still walk away
9 having put \$47 million in his pocket for that period of time.

10 Now, the experts did disagree on how much money the
11 defendants as a whole made. Our expert said 53 million. Their
12 expert said 31 million. I have no doubt our expert was right.
13 And you saw the cross-examination of their expert and hopefully
14 you agree that Mr. Steinmetz was correct and Mr. Quintero was
15 not. But does it really make a difference, 31, 53 million?
16 They are making a ton of money off of these counterfeits.

17 Among the factors that you will be asked to consider
18 is deterrence. This is the most critical factor in this case,
19 I think because in this case the publishers have done
20 everything they can do. They sued them in 2007. They settled.
21 They got an agreement. They wouldn't do it again. They said,
22 send us books if you don't think they are counterfeit. They
23 did once.

24 They find them again. They send a cease and desist
25 letter. They get lied to over and over again. They finally

1 sue them again. They are in litigation. They keep getting
2 counterfeits. We have to sue them again. That's why we have
3 two cases together here. We are still in litigation and we are
4 still getting counterfeits, and you see we are still sending
5 cease and desist letters to them.

6 Deterrence. There has to be a time and a way to send
7 a message to the defendants, enough is enough. This isn't just
8 about the defendants making money. Our educational system
9 relies on this. Our academics rely on this. These are
10 American companies that do critical things for us. We have an
11 obligation to protect intellectual property, not to steal from
12 it.

13 There are 142 copyrights and 10 trademarks at issue in
14 this case. We believe that the evidence we have presented is
15 unequivocal, and even to the extent that the defendants argue
16 there might be a lack of evidence here or there. You have the
17 benefit of the adverse instructions that the judge is going to
18 tell you about and you get to say, well, maybe the plaintiffs
19 don't have a little piece of evidence there or a little piece
20 of evidence there, but the reason is the defendants not only
21 destroyed evidence, but they refused to abide by court orders
22 to turn over information.

23 So you get to consider all that and we think that
24 there is no doubt, no doubt whatsoever that the defendants not
25 only infringed all of these copyrights and all of these

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1 trademarks, but they did it willfully. Look at the e-mails.
2 Look at their course of conduct, not what their lawyers say.
3 Look at what they did.

4 We believe that an award at the highest end of the
5 spectrum is appropriate because anything less will send a
6 message to the defendant, OK, it's just the cost of doing
7 business. It's just something that unfortunately happens from
8 time to time. We would ask that you think long and hard about
9 what message needs to be sent to the defendants.

10 THE COURT: Mr. Oppenheim.

11 MR. OPPENHEIM: Can I just say thank you?

12 THE COURT: Yes.

13 MR. OPPENHEIM: On behalf of the authors, the
14 employees, the shareholders and the publishers, and my whole
15 team, we want to thank you and the Court. It's been a long two
16 and a half weeks. We appreciate all of the time and energy
17 you've put into this and your patience. So thank you very
18 much.

19 THE COURT: Members of the jury, we have concluded the
20 first of the closing arguments that you are going to hear
21 today. After you have a luncheon recess you are going to hear
22 from Mr. Bhandari on behalf of the defendants, and then you
23 will hear a brief rebuttal from Mr. Oppenheim.

24 For now, keep an open mind and come to no conclusions.
25 You are going to have lunch together. You can talk about

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1 anything except this case, the odd start to the baseball
2 season, and there is somebody who is sort of an expert on the
3 jury in that regard. Who knows whether the games will even be
4 played today. But just don't talk about this case.

5 We are going to reconvene in about 30 minutes, and we
6 will bring you back out and you will hear the next closing
7 argument. Then we will take our short recess.

8 Please recess the jurors.

9 (Jury not present)

10 THE COURT: Are there any issues counsel want to
11 raise?

12 MR. GLUNT: None from us, your Honor.

13 THE COURT: Why don't we plan to reconvene at 1:30 and
14 we will proceed from there.

15 Have a good but quick lunch.

16 (Luncheon recess)

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A F T E R N O O N S E S S I O N

1:31 P.M.

THE COURT: Everyone please be seated.

Any issues before we bring the jury out?

MR. BHANDARI: No, your Honor.

THE COURT: Anything, Mr. Gould?

MR. GOULD: I think Mr. Oppenheim would appreciate one extra minute to join us. I think he's very, very close.

THE COURT: Are there any issues?

MR. GOULD: Not that I'm aware of.

THE COURT: Fine.

MR. OPPENHEIM: Your Honor, with your permission, my colleague Scott Zebrak is going to join us at the table.

THE COURT: That's fine. Let's bring in the jury.

(Jury present)

THE COURT: Good afternoon, members of the jury.

THE JURY: Good afternoon.

THE COURT: Members of the jury, I bet you're glad that I decided to get you lunch today in the jury room. I assume you just saw that wall of water that came through from the west.

In any event, we are going to turn now to the closing argument for the defendants. And so I ask that you give your undivided attention to Rishi Bhandari, Esquire, as he delivers his closing argument on behalf of the defendants.

I44VWIL5

Summation - Mr. Bhandari

1 MR. BHANDARI: Thank you, your Honor.

2 All right. Good afternoon, ladies and gentlemen of
3 the jury.

4 THE JURY: Good afternoon.

5 MR. BHANDARI: I hope you enjoyed your lunch. I'm
6 going to be speaking for a little while. And the reason for
7 that is at the end of this case, when I finish and you hear 20
8 more minutes of rebuttal from Mr. Oppenheim, you guys are going
9 to be back in the jury room; and you guys are going to be asked
10 to do three things when you're back in the jury room:

11 First, you're going to be told to answer certain
12 questions that Judge Pauley gives to you guys. Second, you're
13 going to be told to follow the law that Judge Pauley explains
14 to you. And third, before you answer those questions, each of
15 you is going to have to explain to each other why you are
16 answering the questions the way that you are.

17 So in this closing statement I'm going to spend the
18 next few minutes to go through some of the information you'll
19 need in order to explain the answers that you're giving to your
20 other jurors when you're in the deliberation room.

21 Now, the first question that probably a lot of you
22 have right now is why did the publishers bring this case? Why
23 did they decide to sue Book Dogs?

24 You heard a lot of testimony and you heard
25 Mr. Oppenheim's closing argument just a few minutes ago.

I44VWIL5

Summation - Mr. Bhandari

1 Mr. Oppenheim talked for a little bit over an hour, and out of
2 that little bit over an hour, about 40 minutes or 45 minutes of
3 it or so was spent talking about things that happened between
4 2006 and 2011. He just kept talking about 2006, there was some
5 activity that Mr. Smyres entered into with Ple and Book Dogs;
6 2008, there was more communications with Best Books World and
7 Book Dogs; in 2011 there was a counterfeit book that was
8 discovered from the Blackerbys. And I'm going to address that
9 stuff. I am going to address those specific allegations about
10 Best Books World and the Blackerbys a little bit later in my
11 closing statement.

12 But the real question you're probably asking yourself
13 is why are we here in 2018 hearing about a bunch of stuff that
14 happened in 2006 to 2011? Probably another reason you guys are
15 asking that question is because you heard there was a lawsuit
16 in 2007. So why on earth would the stuff that was settled in
17 2008 be things that Mr. Oppenheim is talking about here today?

18 And the answer to that question, when people ask you,
19 Why did the publishers bring this case? When you're back done
20 with your jury service, people say, What on earth was that case
21 about? You'll be able to tell them, Well, the publishers have
22 a business strategy of trying to make sure that used
23 booksellers get slowed down in every way possible. The
24 publishers want to make sure that the used book industry is
25 hobbled as much as it could possibly be hobbled. So they sue

1 people. They sue people all the time; they sue people even
2 when they don't have reasonable cases at all.

3 A third thing I'm going to do in this closing is I'm
4 going to talk about the proof that the publishers actually need
5 to provide to you in order for there to be liability for Book
6 Dogs. You'll see that there is very little.

7 Mr. Oppenheim tried to dance around that by saying two
8 things: First he said, Imagine a scale. And on a scale, the
9 person who wins just has to be a feather more than the other
10 side. Because Mr. Oppenheim knows and the book publishers
11 know, they barely have a feathers of evidence at all. They are
12 not going to be able to prove a lot of the things that they
13 need to prove.

14 So why did they bring this case, when over an hour he
15 didn't spend one minute talking about the books that are
16 supposedly counterfeit, and he spent only a handful of moments
17 talking about the titles at issue?

18 And the answer to that is what you saw when the expert
19 testimony was on -- when Ron Quintero was on the stand
20 yesterday. When Mr. Quintero was on the stand, you saw the
21 profits per book that Book Dog Books makes on all of its books.
22 It makes about \$2 to \$3 per book. That's the profits per book.

23 Now, it doesn't matter if the publishers lose this
24 case; they've already forced Mr. Smyres to sit here for three
25 weeks. You can imagine how long -- how much time it's taken

1 out of Book Dogs' operations, to spend five years litigating
2 this case. You've heard about various discovery orders,
3 documents that had to be produced, his tax returns had to be
4 produced, he had to get audited by the publishers. They have
5 already slowed down Book Dogs' operations. And they know that
6 if Book Dogs is only making \$2 per book, then how are they
7 going to do this every single time? How can they possibly
8 continue to be in the used book business if they make \$2 to \$3
9 per book? But the publishers can bring a lawsuit like this
10 anytime they want and it forces you guys to spend weeks of your
11 life listening to testimony in this case and it forces Book
12 Dogs to be much slower.

13 Here are some facts we know about Book Dogs:

14 As Mr. Mandel told you in the opening statement, since
15 2008, Book Dogs has sold 1,081,432 titles. It might be a
16 little bit higher today; it's been three weeks since this trial
17 started.

18 And what do we know about this case? There are 161
19 questionable titles that are at issue in this case.

20 Book Dogs is not manufacturing counterfeit books.
21 Book Dogs is not intentionally distributing any counterfeit
22 books. Book Dogs is a very, very successful used bookseller.
23 You saw the reviews that were up on the stand when Mr. Essig
24 was there. There were 400-and-something-thousand reviews of
25 customers who were 95 percent positive reviews. There was Apex

1 sellers which had another 400-something-thousand reviews where
2 it was 96 percent positive reviews.

3 Book Dog Books is a very successful used bookseller.
4 And if you want to talk about the educational system, school is
5 expensive. Books are expensive. And for the reasons you heard
6 the publishers talk about, they make sure the price of books
7 keeps being high. How do they do that?

8 Well, can you guys think of any other products where
9 you don't really get to pick the book that you're going to use
10 for a classroom; an instructor picks the book. And you heard
11 the testimony from Mark Dorman, the advisor to the CEO of
12 McGraw-Hill, that one of their major marketing activities is
13 just trying to get the professors to adopt books. Because once
14 they convince a professor that a book is going to be assigned,
15 students have to buy it. When you're told you have to buy a
16 book, the price can be \$300, \$400 for a book that only costs
17 \$12 to publish.

18 We also heard from the booksellers -- from the
19 publishers that the cost of books overseas is considerably
20 less. What other industry is exactly like that? The
21 healthcare industry. You don't get to pick what drugs a doctor
22 decides to prescribe to you. And when you have to get a drug,
23 you have to get a drug. So drug prices in the United States
24 are sky-high. Drug prices in other countries are not so high,
25 because the government over there is trying to make sure that

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Summation - Mr. Bhandari

1 their people don't get -- don't have to pay those sky-high
2 prices or they can't afford those prices in other countries.

3 The booksellers do the exact same thing. They know
4 that in other countries the educational systems won't pay that
5 amount, won't pay for the books for their students, won't pay
6 that amount, or they know the students can't afford it. So
7 that is why they are bringing this case.

8 Since 2011, Book Dogs has sold or rented approximately
9 14 million books. Out of those 14 million books, there are
10 approximately 500 to 700 books here in this courtroom. The
11 percentages are staggeringly small. But they've told you
12 repeatedly this is just the tip of the iceberg. If you only
13 knew how bad Book Dogs is when they are really acting -- when
14 they are acting in their regular course of business, if you
15 only knew how bad they were, then you would want to punish Book
16 Dogs.

17 Well, there was one document that we saw that was an
18 audit report that was put into evidence, it is Plaintiffs'
19 Exhibit 341. You heard testimony from Mr. Singh about it
20 today; you heard Mr. Essig talk about it a few days ago. And
21 that was the publishers got to choose all the books that they
22 wanted to audit from Chegg. They did several audits of 64,000
23 books. Out of the 64,000 books that the auditors picked, they
24 said we want all of Book Dogs' books; pick every single one of
25 the Book Dogs' books that you have in your inventory, Chegg,

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Summation - Mr. Bhandari

1 and let's see how many of them are counterfeit.

2 This is what they found out.

3 All the Book Dog Books were examined. Richard Essig
4 testified that the Chegg spreadsheet refreshed his recollection
5 that 4400 Book Dog books were audited, and 50 of the books were
6 originally flagged as suspect.

7 Now, you might remember or you can verify it yourself
8 with the evidence if you want, but ten of those books were *The*
9 *Art of Public Speaking*. You might also remember that Steven
10 Rosenthal from McGraw-Hill said *The Art of Public Speaking* is
11 not in this case.

12 One of those books was *Campbell Biology in Focus*. You
13 might remember that Diane Peirano -- Richard Essig said Diane
14 Peirano made a mistake when she said that *Campbell Biology in*
15 *Focus* was potentially counterfeit, so that book is not in this
16 case.

17 So the result of the Chegg audit showed that 39 out of
18 4400 books were suspect according to the publishers. That's
19 .886 percent.

20 Now, why is that? How can it be so low?

21 The reason it's so low is because you've heard the
22 testimony from all of these Book Dog employees. They have a
23 culture where they take weeding out counterfeits really, really
24 seriously. Everybody receives the training. The training
25 manuals are updated frequently. They develop these materials

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Summation - Mr. Bhandari

1 on their own. They do the classroom refresher courses twice a
2 year playing those games. They purchase exemplars, they
3 respond to concerns from buyers, they flag and ban potential
4 sellers. They update the master list, they've trained the
5 people who do the inspections for Amazon, those Noram people,
6 they do shelf checks. They are constantly improving their
7 policies. They reject counterfeits every single time.

8 That's an important point. Every email you've seen in
9 this case regarding counterfeits is someone at Book Dogs
10 saying, We don't want counterfeits. That is not evidence of
11 counterfeits; that is evidence of a culture that is very much
12 against counterfeits.

13 They invited the publishers to come and be on their
14 fraud operations team to try and weed out books. There is a
15 culture of stopping counterfeits.

16 So when the publishers say actions speak louder than
17 words, that's exactly what this case is about. Book Dogs'
18 actions speak very loudly.

19 You guys have all worked at different offices. You
20 know when there's a company culture that encourages certain
21 things or is willing to turn a blind eye to certain things.
22 Some places say, Hey, we've got a diversity sensitivity
23 training, and then they'll give you a piece of paper and you
24 won't ever go back for ten years while you're working there.
25 Other places might say, Listen, we want to make sure that every

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Summation - Mr. Bhandari

1 whistleblower in this company comes forward and speaks freely,
2 but then they don't have any trainings about it.

3 This company says, We want to weed out counterfeits.
4 And what do they do? They have trainings twice a year and they
5 do all the other things we've said.

6 So if anybody asks you -- and as you know from the
7 testimony you've seen, these are all the different steps that
8 get taken in the current inspection process. That's how the
9 rate of counterfeits that are getting through is so low for
10 Book Dogs.

11 Now, at the end of the day, here's the other piece of
12 information that you know: It is impossible to stop all
13 counterfeits from getting through. You remember the testimony
14 of Richard Essig which was played for you at the beginning.

15 Whoops. Let's see if I can get that back.

16 (Video played)

17 MR. BHANDARI: Ladies and gentlemen of the jury, you
18 heard that repeatedly from every single one of the publisher
19 witnesses who testified. There is no book distributor out
20 there that can 100 percent weed out counterfeits.

21 I know what you're thinking. Some of the people on
22 the jury are going to say, Well, it's not the publishers'
23 problem if you can't follow the law. Why on earth should the
24 publishers be punished? You should have to follow the law.
25 And you should have to do what needs to be done.

1 Ladies and gentlemen of the jury, we agree with that.
2 We agree with that 100 percent. When the publishers were
3 talking about the fact that the legitimate booksellers are the
4 ones who are hurt by counterfeit distributions, that's Book
5 Dogs. Book Dogs turns away counterfeits anytime it finds them;
6 it has to eat the cost of thousands and thousands of
7 counterfeits each year. We want nothing more than for
8 counterfeits to be eliminated from the system.

9 But this case, there's two issues.

10 First of all -- and I'm going to get to this very
11 soon -- the publishers have not met their burden of proof with
12 regard to the 161 titles at issue in this case. And I'll
13 explain that in a little bit more detail.

14 But second of all, even if you find that for some
15 small percentage of them they had, you know that Book Dogs has
16 been doing everything that it could possibly do to eliminate
17 counterfeits.

18 I'm going to give you an example. Everybody in here
19 probably hates mosquitoes. I know I hate mosquitoes. No one
20 is going to say mosquitoes are a good thing. So what do we do
21 when we are out in a park during the summer, or we're in
22 someone's backyard during the summer, eating a nice picnic, a
23 bunch of mosquitoes show up or you know that there's mosquitoes
24 in the area, you might use some bug spray, you get rid of some.
25 You might use a lot of bug spray. You might use a zapper, you

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Summation - Mr. Bhandari

1 get rid of some. You might put up a mosquito net.

2 But you know what? No matter what you do, no matter
3 how many precautions you take, there's not a single person in
4 here who can say you're never going to get bit by a mosquito.

5 And the idea that a company can be put out of business
6 or they should have to pay significant penalties because,
7 despite their best efforts to stop counterfeits from getting
8 through, a couple may have gotten through, it's a terrible idea
9 for the students, it's a terrible idea for the educational
10 system, and it is not what the copyright laws and the trademark
11 laws intend for people to do.

12 As Mr. Oppenheim talked about, there's a huge range of
13 damages. The damages could go from \$200 per book to \$150,000
14 per book -- per title, excuse me. \$200 per title to \$150,000
15 per title for copyright infringement.

16 Now, the things at the higher end of that are
17 obviously designed for the people who are manufacturing the
18 counterfeit books, the people who are really injecting them
19 into the system to begin with. The medium amount will be for
20 people who are intentionally trying to do it. The lowest
21 amounts are for the people who do everything they could
22 possibly do to stop counterfeits, and yet a couple of them
23 still go through.

24 Out of 161 titles you're going to see there's a tiny
25 fraction of them that it's even possible to argue that there's

1 some evidence. If you were to find on those small number of
2 counterfeits going through, the damages must be on the lower
3 side, because there's nothing that can be done to eliminate the
4 problem altogether.

5 So understanding that, what were the arguments that
6 the publishers made at the beginning of this case? First they
7 said, you know, it's true. They understand. There was no way
8 that you could say everybody who has counterfeit that slips
9 through their inspection process has to be hit with significant
10 damages or is even worth suing. They know that's true.
11 There's no student -- even the students frequently send in
12 counterfeit books that they buy inadvertently. No students --
13 according to the publishers, they cannot recall suing any
14 students. You can't sue everybody for minor infractions.

15 But here they came up with this theory. They said,
16 You know what Book Dogs is really doing? Yeah, they have a
17 bunch of inspection processes in place, but they were buying
18 books at too-good-to-be-true prices. Defendants were buying
19 \$20 bills for \$10 apiece.

20 That was probably a very convincing argument to a lot
21 of you during opening statement. Everyone has probably been to
22 Canal Street and you see when there's Coach bags over there
23 being sold for \$20, you know that there's something counterfeit
24 about those. You know when you're buying a \$20 bill for \$10
25 there's something very counterfeit about it.

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Summation - Mr. Bhandari

1 But let's look at what the truth is about books.
2 Books are different than \$20 bills and different than Coach
3 bags.

4 We saw the testimony of Richard Essig, when he was
5 asked, How much cheaper are the Indian editions of those books
6 on average? He said they cost about \$12, for a book that would
7 cost about \$100 in the United States.

8 What price is too good to be true for that?

9 Mark Dorman, the advisor to the CEO of McGraw-Hill,
10 gave the same testimony: Is India one of the countries that
11 gets books for a lot cheaper?

12 Certainly is, yes.

13 And you also heard from Mr. Sampson yesterday, when he
14 was giving his video deposition: Is there any rule of thumb
15 about how much a book should cost -- a used book should cost in
16 relation to a new book?

17 And he said no, there's no rule of thumb.

18 There is no evidence whatsoever of too-good-to-be-true
19 pricing in this case.

20 So ladies and gentlemen of the jury, when somebody
21 says to you, Well, of course Book Dogs knew that they were
22 buying counterfeits; they were buying it at too-good-to-be-true
23 prices, you will have to say to them, There's no evidence of
24 that at all. Nobody even knew what the prices should be.

25 And the prices you saw, there was one email that came

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Summation - Mr. Bhandari

1 in yesterday or last week -- sorry, it's a little bit of a blur
2 for me. But there was one email that came in that said Book
3 Dogs was paying \$128,000 to Best Books World in 2010 for a big
4 shipment of books. That's not nothing. This was like a
5 significant purchase of a big amount of money for books that
6 they thought were legitimate books and were very upset when
7 they found out they weren't. They tried to return them to get
8 their money back. There's literally no evidence in this case
9 that they knew that the prices were too good to be true for a
10 single title at issue in this case, for any book, let alone a
11 title at issue in this case.

12 So then this was amazing. At the opening statement,
13 you heard Mr. Oppenheim say: The defendants may say, Oh, the
14 publishers don't like used booksellers. You will hear the
15 evidence that is not true, because used textbooks didn't start
16 out as used textbooks; they started out as new textbooks. So
17 the publishers have no issue with used textbooks. What they
18 have an issue with are counterfeits.

19 Then you heard Mr. Dorman say: How do the publishers
20 view used books?

21 We like used books.

22 That's actually what he says under oath right in front
23 of you.

24 And then, about 80 pages later in the transcript --
25 that was on pages 125 of the transcript, about 80 pages later

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Summation - Mr. Bhandari

1 you'll remember I was cross-examining him. I said: Did you
2 say that?

3 He said, Yes, I did.

4 Then we went through the McGraw-Hill annual report
5 where they have measure after measure designed to cut down on
6 the used book market. And after he saw that and he realized
7 they've been telling one thing to investors and another thing
8 to the jury over here, this is how he answered that question:

9 McGraw-Hill does not like the sale of used books;
10 correct?

11 Correct.

12 So you do not like used books; correct?

13 They are competition, yes.

14 So again, when somebody asks you after this case is
15 all over, Why did the publishers sue if Book Dogs wasn't bad at
16 all? Why did the publishers bring this giant case and you have
17 to sit through a three-week trial if Book Dogs didn't actually
18 do anything wrong?

19 Your answer is right here: They don't like used
20 books. And they lied about it. They've lied about it under
21 oath. Mr. Oppenheim misled you in his opening statement. And
22 the reason they did that is they couldn't tell you the truth.
23 If they came in here and said, Listen, we are suing them
24 because we want to slow down the used book industry, you would
25 have to throw the case out. There's no law that says you can't

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Summation - Mr. Bhandari

1 sell used books.

2 So that's why they gave this testimony also:

3 How does Pearson decide whether to sue a distributor?

4 It is the last resort when everything else has failed.

5 Then you might remember Mr. Glunt went through a bunch
6 of lawsuits that the publishers had filed. And at the end he
7 said: The fact is we can name a lot of other lawsuits, could
8 we not, sir?

9 And Mr. Garry said: You could name more.

10 And, in fact, the names that have come out in this
11 case alone are they sued Lindsay Bache, the Blackerbys,
12 Follett, Texas Book Company, Tichenor. They threatened
13 lawsuits against Amazon, Barnes & Noble, Chegg, eCampus,
14 Ingram, MBS.

15 Their goal is to slow down the sale of used books.
16 This is a business strategy. And they pretended that it
17 wasn't; they pretended they were reluctant to sue, but now you
18 know why they do it.

19 Lisa Suarez made the same point when Mr. Glunt asked
20 her: What major distributor can I buy my books from if I want
21 to buy from someone who's never been accused of selling
22 counterfeit books?

23 And you might remember her testimony. She was very
24 clear; she spoke loudly. She said: Look, I -- I mean I don't
25 know the answer to that. Yes, they've been accused; but again,

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Summation - Mr. Bhandari

1 you have to look at what you're buying and make sure what
2 you're buying is legitimate.

3 The answer is there is nobody they haven't accused,
4 and there are many people who they have already sued.

5 Publishers are devious. They have various different
6 measures. And again, they lied about the used books and said,
7 The only reason we make revisions to the textbooks is for
8 pedagogical reasons and when the subject matter changes.

9 And then again on cross-examination Mr. Dorman
10 admitted, Yes, revisioning is a strategy we use in order to cut
11 down on the sale of used books. They have a revision cycle
12 where they come up with an idea that they are going to revise
13 the book in two years, regardless of whether or not there have
14 been subject changes, because by doing that they reduce the
15 sale of used books.

16 This lawsuit is a business strategy.

17 The publishers have already accomplished their goal of
18 slowing Book Dog Books down. And whether or not you throw this
19 case out, they are going to try and threaten to sue many other
20 people and explain that they were willing to take this case to
21 trial.

22 So remember, when people ask you why this lawsuit was
23 brought, if there was nothing to it, this is the reason.

24 So that brings me to the instructions you're going to
25 be hearing in this case. So we can actually talk about the

1 titles in this case.

2 You will hear from Judge Pauley that you must
3 determine whether defendants are liable for infringing
4 copyrights belonging to the plaintiffs and, if so, how many.
5 This must be determined individually on a
6 copyright-by-copyright basis.

7 So when Mr. Oppenheim said, Don't worry about the
8 books in this case; there's plenty of other things you can
9 think about, like what happened in 2006 or some letters that
10 they sent that have no proof whatsoever supporting them, he was
11 wrong. He once again misled you.

12 The instruction you're going to hear is that you must
13 consider this on a copyright-by-copyright basis. And of
14 course, you must decide by a preponderance of the evidence that
15 they have proven it.

16 Similarly, the trademarks that you have to decide have
17 to be determined on a trademark-by-trademark basis. So out of
18 the 162 titles at issue in this case, they've divided 142 of
19 them as copyright claims and ten of them as trademark claims.

20 Now, think about this trial for a second. I'm going
21 to take you all the way back to the beginning. How many books
22 do you think that they show you in this case? The books have
23 been sitting there this entire time. You remember Diane
24 Peirano said out of the 78 Pearson titles at issue in this case
25 she did an examination of two of them. For Rosenthal, I think

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Summation - Mr. Bhandari

1 he did an examination of one or two of them. For Mr. Tesoro,
2 he did an examination of one of them. They showed you
3 somewhere between maybe five and ten books out of 161. For
4 everything else they said, Trust us. Listen, we've got a
5 roadmap here and you can trust us. If you just follow this
6 roadmap, then you'll be able to figure out everything in this
7 case.

8 Now, what would you expect to see -- what kind of
9 testimony would you expect to see if there was a roadmap that
10 was all of the evidence for almost all of the titles at issue
11 in this case? You probably expect to hear this, right:
12 Somebody would get on the stand, maybe one person, maybe two
13 people, maybe one from each publisher, four people. And every
14 single one of those four people would get up on the stand and
15 say, Hey, this roadmap, I believe this roadmap. I put this
16 roadmap together. I double-checked it, I triple-checked it. I
17 swear under oath that you can trust this roadmap. This is our
18 evidence. While we are not showing you a lot of books, you can
19 believe our roadmap.

20 Now, is that what actually happened in this case?

21 No. Nobody from Cengage, Wiley, or McGraw-Hill was
22 willing to put their names on the roadmap. You probably
23 remember testimony from Mr. Essig being like, Hey, I know what
24 the roadmap is, but I didn't create it, I don't really know.
25 No one from McGraw-Hill said that they believed in that

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Summation - Mr. Bhandari

1 roadmap.

2 No, there was only one witness who even tried to
3 testify about the accuracy of the roadmap. And you guys might
4 remember that was John Garry. And you'll remember that that
5 testimony -- Mr. Glunt cross-examined him for several hours,
6 and he walked through all of the omissions, the errors, the
7 exaggerations and lies in that roadmap. You'll remember this,
8 this board, where Mr. Glunt was crossing out each title when it
9 turned out that there was no real evidence to support that
10 title.

11 You'll remember Mr. Glunt poking 116 holes in the
12 roadmap while Mr. Garry sat on the stand. And this is how it
13 went. This is an example of one of the holes that was poked in
14 the roadmap or several holes.

15 If you look at plaintiffs' roadmap, title 78,
16 *Contemporary Issues in Curriculum*, there were four different
17 things that supposedly provided the source of the counterfeit
18 books. One, it was a wholesale turnover from Texas Book
19 Company; second, the wholesale turnover documents were
20 supposedly shown in Plaintiffs' Exhibit 42; third, the
21 inspection of the books in defendants' possession was one copy;
22 fourth, there was a summary of the defendants' inventory
23 disclosures. Every single one of those things was wrong.

24 First, the wholesale turnover document from Texas Book
25 Company. You look at Exhibit 42, and it was not, as you can

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Summation - Mr. Bhandari

1 see from the testimony of John Garry. Title 78 is another book
2 that was allegedly turned over by the Texas Book Company.

3 "And again, PX-42 doesn't show the turnovers from the
4 Texas Book Company?

5 "A. No, sir.

6 "So again, the roadmap is just wrong about that?

7 "Yes."

8 Then the testimony from Texas Book:

9 "Hypothetically, let's say you wanted to figure out
10 from among these, say, 100 books which one you received from
11 Buckeye Books, would you be able to find these books?

12 "No."

13 That's the testimony from Texas Books, representative
14 Thomas Steele.

15 And then there was supposedly the inspection of the
16 books in the defendants' possession. This is the quarantine
17 books, right?

18 Now, you have to ask yourself -- Mr. Oppenheim
19 claimed, do you know what the quarantine books are? It's just
20 like cookies being taken out of a cookie jar and your kid has
21 crumbs all over his face, and you walk in and you're like,
22 Where are all the cookies? Why do you have crumbs on your
23 face? He ate the cookies.

24 That is not how the quarantine room works at all. The
25 quarantine room are books that are taken out of the inventory

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Summation - Mr. Bhandari

1 and they are stored in a locked room so that they don't go into
2 the inventory and they don't get sold. So the only thing we
3 know about the books in the quarantine room is we definitely,
4 100 percent did not distribute them.

5 What it would be like -- and this is impossible, to be
6 perfectly honest, to take this analogy in real life. But what
7 it would be like is if Mr. Oppenheim's kid saw those cookies,
8 realized that some of them looked like they might have raw eggs
9 on them or something was wrong with them, and then they took
10 those cookies and they put them in a safe or someplace where no
11 one would eat them by accident. And then Mr. Oppenheim gets
12 home and he's like, I'm going to assume you ate all the cookies
13 because -- and then the child is like, No, I put them away so
14 that no one would eat them because I think they are dangerous.
15 And he's like, That's ridiculous. Anybody who would put
16 cookies away to keep them safe would obviously be the kind of
17 person who just gobbles them up too. So you're in trouble.
18 You're grounded.

19 That's the analogy of the quarantine room. It
20 literally makes no sense.

21 If you think about it, there was no possible way that
22 Book Dogs could do anything with those books. Because they say
23 if you destroy the books, well, then, that's destruction of
24 evidence. If you quarantine the books, then obviously that's
25 evidence that you have more.

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Summation - Mr. Bhandari

1 I'll come back to that, but there's literally -- it
2 makes no sense. The books that are in quarantine obviously
3 cannot be considered books that were distributed. They were
4 books that were taken out of circulation because there was
5 something wrong with them.

6 So if someone says to you, Hey, isn't it true that
7 they were caught red-handed with a bunch of books that were in
8 their possession? You would say to them, Those were the
9 quarantine books. The quarantine books are obviously not books
10 that were being distributed; they don't violate the copyright
11 law; they don't violate the trademark law. And that's
12 important. Because people are going to say, What about these
13 43 books?

14 The testimony from John Garry supports that, as he
15 said: "When the roadmap refers to books, those books were
16 already identified as suspect; correct?"

17 "That is correct, sir."

18 The summary of the inventory disclosures. Mr. Garry
19 claimed, Well, these inventory disclosures, the numbers don't
20 match up. But then when he looked at it more closely and he
21 saw that the single copies were not included in the sales
22 disclosures, he admitted that if a student sold a single copy,
23 the data would not be included in the roadmap.

24 The roadmap does not contain accurate information.

25 And so what did Mr. Garry do at the very end of that

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Summation - Mr. Bhandari

1 cross-examination? Mr. Glunt asked him point-blank: This is
2 your roadmap, right, Mr. Garry?

3 And he says: So I'll say again, this is the Court's
4 roadmap. We prepared it pursuant to the federal rules of civil
5 procedure. This is not my roadmap. This is the world's
6 roadmap.

7 You remember that?

8 And then the Court had to step in and say: Hold on,
9 ladies and gentlemen. First of all, this is not the Court's
10 roadmap. The Court had nothing to do with preparing this
11 roadmap.

12 And nobody wanted to take credit for this garbage
13 roadmap because it's riddled with errors and it was shown to be
14 just totally unreliable in every way. This is the clearest
15 indication of that. Not one person was willing to get up there
16 and swear under oath, Yes, this roadmap is something I
17 prepared, I double-checked it, triple-checked it, you can rely
18 on this, everything is accurate.

19 And that will be fine. They don't have an obligation
20 to prepare a roadmap for you; they are not mapmakers. That's
21 not what they do. They could have come in here and actually
22 shown you the books. They could have said, Here is the
23 evidence we have that this book was sold by the defendants.
24 Here is the evidence we have that that book was sold by the
25 defendants. Here's the evidence we have that the distribution

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Summation - Mr. Bhandari

1 happened on this date or that date. They could have totally
2 done that. That's probably how any reasonable person would put
3 on a case where they had evidence.

4 Instead they are giving you a roadmap that is just
5 full of errors, 116 errors pointed out by Mr. Glunt, and that
6 nobody from their side is willing to swear to is accurate.

7 Mr. Oppenheim showed you this, you probably remember
8 it from opening statement. The roadmap is inaccurate because
9 it claims that there's evidence for a bunch of books that
10 there's no evidence for whatsoever.

11 Let's start with the five titles that are missing.

12 Mr. Oppenheim said, This is the best part. There are
13 five titles that were basically things that were bought from
14 Best Books World. These are really strong. We've got really
15 good evidence for that. Because, think, they bought stuff from
16 Best Books World, and then they didn't return all of them, so
17 we can assume that some of the ones of these five titles are
18 obviously counterfeit. We don't have a copy of it, but it's
19 more likely than not, right, ladies and gentlemen?

20 And the answer is of course not. There is no evidence
21 whatsoever that Best Books World was only selling counterfeit
22 books. I'm going to get to that a little bit later, but what
23 kind of company that is selling counterfeit books then agrees
24 to give a refund when someone tries to return some of those
25 books?

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Summation - Mr. Bhandari

1 Yes, Best Books World probably had a bad source or
2 supplier themselves. But a company that is trying to actually
3 sell the counterfeit books, when you succeed -- let's say you
4 go to Times Square and someone's like, Hey, anybody want some
5 *Hamilton* tickets? I've got some *Hamilton* tickets; \$50 for some
6 *Hamilton* tickets.

7 And you're like, Great. Yes. I'll take those. That
8 sounds wonderful.

9 And he's like, Sorry. I know it's cheap, but I've got
10 to run and I've got to go. I'm not able to see it and I just
11 want to get rid of it to a big fan.

12 You buy the tickets. One minute later you're like,
13 Oh, wait a second, this is for yesterday's show.

14 You run after the person. You're like, Excuse me,
15 sir? Excuse me, sir? This is for yesterday's show.

16 They are like, Oh, sorry, yes, let me give you your
17 \$50 back. I thought it was today's show.

18 That's not what happens. Best Books World refunded
19 money for the books that were -- the counterfeit that they sent
20 back to Best Books World.

21 So I'll get to that in a little bit more detail, but
22 obviously not all their books are counterfeit, because that's
23 not the way they were operating their business. And if they
24 can't produce an actual book, you can't say it's more likely
25 than not. They don't produce statistical evidence, they don't

I44VWIL5

Summation - Mr. Bhandari

1 produce an actual book, they don't produce anything so that you
2 can believe that those books are more likely than not
3 counterfeit and actually distributed by the defendants.

4 The next one is titles pulled out of circulation,
5 that's the quarantine; I talked about that before. These are
6 the bad cookies.

7 Then there's the titles found in third-party
8 inventory. This is important, ladies and gentlemen. People
9 are going to say, What about the books that MBS had?

10 Why this is important is these books were found in
11 MBS's inventory, and MBS does not have any evidence whatsoever
12 tying them to Best Books World. That's very important.

13 What you need for these books to be tied to Best Books
14 World is someone from MBS to say, Yes, for these 33 titles we
15 know that we got it from Best Books World -- excuse me, we know
16 that we got it from Book Dogs. They have no testimony for that
17 whatsoever.

18 And what Mr. Oppenheim said is, Isn't it more likely
19 than not that one book that was counterfeit that we randomly
20 pulled out of MBS's inventory is coming from the defendants in
21 this case? And people might say that to you. Someone might
22 say to you, Isn't it more likely than not that that book came
23 from MBS? And you would say to them, Well, how many other
24 people sold to MBS? How many books were in MBS's inventory?
25 What was the likelihood -- what was the statistical likelihood

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Summation - Mr. Bhandari

1 that that particular book actually came from the defendants?

2 And you'll notice the publishers didn't put on any of
3 that evidence. The answer is of course it's not more likely
4 than not. If they had evidence that statistically it was more
5 likely than not it came from our inventory, they would have had
6 to show you the number of books in MBS's inventory, they'd have
7 to show you what was selected out of there, they'd have to show
8 you something. But there's nothing. And that's because their
9 argument is basically this:

10 We know you sold that title to MBS. We found one
11 counterfeit copy in MBS's inventory. We know lots of other
12 people sell that title to MBS, but we assume it's you.

13 Would that be acceptable proof for anything anywhere
14 in your life? If you decide that you're going to sell
15 something, you know, you sell your -- can't say car because
16 that one is pretty easy to trace back. But if you decide to
17 sell an antique that you have to somebody, and the antique --
18 and the person who has like a bunch of those antiques says, You
19 know, I found one of these antiques is counterfeit. I assume
20 it's your fault. That's not right. They have to actually say,
21 This is the counterfeit I got from you. That's why there's no
22 evidence whoever.

23 It's similar. Sometimes they were found in
24 third-party inventories, sometimes they were found in
25 quarantine and third-party inventories. But there's no

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Summation - Mr. Bhandari

1 evidence whatsoever that we actually distributed a copy of that
2 book.

3 And that leaves us with the 45 titles with some level
4 of evidence. So that's what these are, ladies and gentlemen.
5 We are not trying to hide the ball from you. Here are the 45
6 titles. If you're taking notes you can write down and you can
7 cross-reference this on the roadmap if you wanted to. Here are
8 the 45 works, where, after you cross out 116, these are the
9 ones where there's some level of evidence. One, two, three,
10 the roadmap number is right there on the left. And you will
11 have the ability to look at those.

12 Now, out of those 45 works, just because there's some
13 evidence that's not the quarantine or the missing books or the
14 fact that it was an MBS or Tichenor's inventory, just because
15 there's some level of evidence, that doesn't mean it's proven
16 that it's our book.

17 We will say, however, for 14 of them there's a sticker
18 that is tied back to TextbookRush. And for these 14 books, it
19 is more likely than not, we will concede, that we distributed
20 these books. So that is the first thing you have to look at.
21 For 14 of these titles, it's more likely than not that we
22 distributed these books and we are not walking away from that.

23 But you have to then go to the second issue, which is
24 whether or not these books are counterfeit. And that they have
25 not proven as well. You have to make sure that the books are

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Summation - Mr. Bhandari

1 actually counterfeit if we distributed them.

2 So let's take a look at what the evidence is that we
3 supposedly distributed some of these -- the 45 books.

4 There's a Chegg spreadsheet that they cite for some of
5 those 45 books. Not the ones with our stickers; the ones with
6 our stickers we are not walking away from. But for the other
7 ones they've got a Chegg spreadsheet.

8 You heard the testimony from Mr. Singh today. Chegg
9 created that spreadsheet.

10 And then he was asked: How accurate is Chegg source
11 information on those spreadsheets?

12 And his answer was: It's a system that we rely on.

13 He didn't say it's very accurate; he didn't say
14 everything in it is correct. He just said it's a system we
15 relied on it.

16 There are certain MBS documents, such as PX-32,
17 DX-287, DX-288 that are in evidence that don't shed any further
18 light on who actually distributed these books. Then there's
19 scraps of paper that don't seem to show anything. For example,
20 title 141 has some sort of invoice that was written on by the
21 plaintiffs or the plaintiffs' lawyers for \$400,000 that
22 Mr. Garry claimed was found in the book or near the book. So
23 there are other ones. Even out of the ones that are there, you
24 would be able to eliminate many of them if you were to do the
25 work yourself.

1 So that brings us to -- for the 14 books that have our
2 stickers on them or maybe some small number above that that you
3 think that there's some evidence of distribution for, how do we
4 know they are counterfeit? And the way we supposedly know they
5 are counterfeit is because the plaintiffs' employees got up
6 there and said, Listen, we look at them. And we're right not
7 90 percent of the time, not 99 percent of the time, we're right
8 100 percent of the time.

9 Ladies and gentlemen of the jury, this system makes no
10 sense whatsoever. Here are some of the books that are at issue
11 in this case. Now, the plaintiffs claim that they are right
12 100 percent of the time with these books, but you remember what
13 their process was. Their process is that they get books that
14 already have counterfeit stamps on them. Then the job of the
15 plaintiffs' employees is to look at books that have a
16 counterfeit sticker on them and come up with reasons for why
17 it's counterfeit.

18 When we provided two authentic copies, Jensen 104 and
19 106, to plaintiffs from several of these companies and said,
20 Can you tell us whether or not Jensen 105 is authentic or
21 counterfeit? None of them could. Unless they already have the
22 sticker that's on it saying that it's counterfeit, they can't
23 actually make the decision.

24 And that testimony, Mr. Jensen himself changed his
25 testimony. When he was being deposed he said, I can't tell

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Summation - Mr. Bhandari

1 whether or not Jensen 105 is authentic or counterfeit. He's
2 like, I don't know. On the stand he said, I think it's
3 authentic.

4 The point is eyeballing books is not the most reliable
5 method for figuring out whether or not books are counterfeit.
6 And certainly having the plaintiffs' own employees, who are
7 extremely biased, and looking at them when they already have
8 counterfeit stickers on them is totally not the right way to do
9 it.

10 You've probably heard of something called confirmation
11 bias before. It's the idea that if you want -- if you want an
12 outcome to happen, you look for all the information that
13 supports that outcome.

14 And you probably heard of something called the Pepsi
15 Challenge. The Pepsi Challenge was when people had to decide
16 whether or not one soda tasted better than the other soda. One
17 of the sodas was not labeled "Coke" and the other one was not
18 labeled "Pepsi"; they were both kept under wraps so that if a
19 person is trying to do a true taste test, they don't know which
20 one is which.

21 The methodology used by the plaintiffs in this case
22 doesn't even meet that basic standard. When you're doing a
23 bunch of advertisements for Pepsi, you at least cover up and
24 you don't tell them whether or not you think it's Pepsi or not
25 Coke. Here, every single one of the ones that was examined was

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Summation - Mr. Bhandari

1 supposedly counterfeit.

2 Now, maybe that would be okay if there wasn't another
3 method that could be used. But all of you heard there's a
4 really easy other method that could be used and it was to test
5 the paper. They all said that you can run paper tests to
6 figure out whether or not the paper is exactly the same as the
7 paper that's in the questionable book. And whether or not they
8 look beat-up, whether or not they look different, whether or
9 not they have differences, if you run the paper tests, that's
10 something that can very frequently tell you for sure if
11 something is the same or different.

12 Why would the publishers, which are
13 multi-billion-dollar companies, not just run these basic paper
14 tests? It doesn't make any sense. The reason they don't run
15 the paper tests is because they know that their employees are
16 not 100 percent accurate. They wouldn't even test their
17 employees; they never even do any sort of statistical analysis
18 to know how right they are.

19 So remember three things: When people say to you in
20 the jury room, Well, those four folks who came in from the
21 publishers sounded like they knew what they were doing. They
22 were looking at a lot of books. How can you say that it's not
23 more likely than not that they are correct?

24 You can say three things to them:

25 First, they didn't even talk to us about most of the

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Summation - Mr. Bhandari

1 books. Out of the 161 titles they only talked to us about
2 eight or ten of them.

3 Second, the books that they did talk to us about, they
4 weren't always from the same print run, and yet they still made
5 decisions on them. You remember Ms. Peirano's testimony where
6 she had two books from different print runs, and she still
7 concluded that the book in the middle was counterfeit, but
8 nobody else could do that when it was the Jensen books.

9 And the third thing is they are the employees of the
10 plaintiffs. They are totally biased. Would that be the kind
11 of evidence you would expect if you were being judged for
12 something? Wouldn't you want an objective expert to explain
13 this to you? A paper test could be easily done. It would be
14 like a doctor testifying that someone has high cholesterol
15 without running a cholesterol test. It literally makes no
16 sense.

17 Now, let's talk about the Book Dog Books stuff.

18 This is not what this case is about. This case is
19 about the 161 works at issue in this case, and there's only the
20 five of the Best Books World books are missing, and the conduct
21 from 2007 to 2010 is not what this case is about. But even if
22 it was, I'm going to explain to you why Mr. Smyres was acting
23 perfectly reasonable.

24 I'm going to show you a timeline.

25 On September 28, 2007, Ple offered to sell books to

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Summation - Mr. Bhandari

1 Book Dog Books. On October 2nd, 2007, the publishers sued Book
2 Dog Books. On October 6, 2007, Smyres declined to buy the
3 books, citing concerns about books from Thailand.

4 So the first thing he did was say, Listen, I hear that
5 there are counterfeit books coming out of Thailand. I don't
6 want any of them. Not the sign of someone who's looking to
7 acquire counterfeits.

8 Now, a year goes by. July 1st, 2008, Ple again offers
9 to sell books. Book Dog Books makes a small test order --
10 sorry, my colleague reminded me to say something to you.

11 It is very important to know that Book Dog Books did
12 not buy any books for that time period between 2007 and here we
13 are on July 1st, 2008. You probably knew that because there's
14 no evidence of that, but I need to make sure that you remember
15 that.

16 So July 1st, 2008, it's a year later, Ple again offers
17 to sell books, and Book Dog Books makes a small test order and
18 sends books to publishers.

19 Now, this is amazing. Someone might say to you, Come
20 on. Phil Smyres knew that dealing with Ple was extremely
21 dangerous. He had to know. Well, if they say that to you, you
22 would say, Well, then why did he send books to publishers?
23 Does a drug dealer decide that if someone says, Hey, here's
24 some baking soda, but he thinks it's cocaine, does he decide to
25 send it over to the police department to get it inspected? Of

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Summation - Mr. Bhandari

1 course not.

2 Mr. Smyres did not think he was getting counterfeit
3 books from Best Books World. He checked with them. He said,
4 Listen, I'm going to send these to the publishers. They said
5 send them to the publishers. He did send them to the
6 publishers. If his goal was to secretly sell counterfeit
7 books, you're not showing the publishers the counterfeit books
8 to begin with.

9 So there's a July 2008 settlement agreement that gets
10 signed. The publishers inform Mr. Smyres that the books that
11 Ple sent, those books were counterfeit. And on September 12,
12 2008, after two out of the three books that were sent to the
13 publisher were counterfeit, Mr. Smyres ends the relationship
14 with Best Books World. So that's September 12, 2008. Except
15 for those small number of books that were bought as a test buy,
16 no books were bought by Mr. Smyres from September of 2007
17 through September of 2008.

18 Now, whoever this Ple person is, you've got to give
19 them some credit, they are persistent. September 17th, 2009,
20 Ple reestablishes contact with Mr. Smyres.

21 Now, put yourself in Mr. Smyres' position. Ple had
22 given refunds before; Ple had accepted the return of the books.
23 Mr. Smyres assumed that she was also victimized by some
24 unscrupulous sources selling counterfeit books. He thought
25 that the counterfeit problem had gone down significantly

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Summation - Mr. Bhandari

1 because between the time he settled with the publishers in
2 2008, he hadn't received any notifications from the publishers
3 that there were any counterfeiters that were out there. He
4 himself had not been encountering counterfeit books.

5 So he thought, You know what? Let's give her a second
6 chance. Let's see if this relationship can work out now. She
7 was probably victimized by the books, so was I. If we can work
8 together, that would be great. And they did. For a little bit
9 over a year they worked together. And again, he didn't see any
10 books that he thought were counterfeit. They were always on
11 the lookout for that.

12 You heard from Josh Frenette; you heard from Barb
13 MacFarland; you heard from the people who were there in those
14 early years that even then they were looking for counterfeit
15 books and they would always say, We don't want any.

16 But on February 4th, 2011, Mr. Smyres was notified
17 that there were counterfeit books coming out of Thailand. And
18 then you saw the emails that Mr. Oppenheim showed you, that in
19 April of 2011, he said, Either prove to me your books are real
20 or I'm going to stop buying from you. She didn't prove that
21 those books were real and so he stopped buying from her.

22 It is very easy in a trial, where you can condense
23 four years into a day or a week or two weeks, to show a bunch
24 of emails over the course of some years, to suggest that
25 Mr. Smyres is a total idiot. You're like, How can he be so

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Summation - Mr. Bhandari

1 dumb? These are six emails or eight emails that he received
2 where he was like trying to meet with her -- was that me? Oh,
3 it is me. Battery is running low. Give me one moment. This
4 could be with less visuals in a few moments.

5 So you have to remember the context. I don't know
6 what your email boxes are like, but in the course of, you know,
7 many people's lives, they send hundreds of emails a week,
8 thousands of emails a month, tens of thousands of emails a
9 year. I bet if you pulled out emails from any single person
10 anywhere in the world, you're going to find some emails which,
11 in retrospect, might make you think, Oh, if I had known all of
12 those things then, I would have done something differently.

13 But the truth is when you look at this timeline and
14 you see the information that Mr. Smyres had, that is not the
15 actions of somebody who's trying to get counterfeit books.
16 It's the actions of somebody who wanted to give a second
17 chance, who thought that other people were like him who were
18 also trying to weed out counterfeit books, but sometimes had
19 bad luck with counterfeit books. And if you look at their
20 emails, they really are -- they all support that.

21 Mr. Smyres in 2008 said, We will send copies of
22 several titles to the publishers for verification of
23 authenticity unless we receive a refund. Then he received his
24 refund. In August, as you see in this, So sorry for the
25 troubled situation. Ple wrote back saying, Please recheck or

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Summation - Mr. Bhandari

1 submit the result of the verification to me for the best
2 decision and action. More details needed. Frankly, we are
3 faithful in our business supporting data. Other customers has
4 not had this problem and first time in this case.

5 I get it, words are cheap; anyone can say that in an
6 email. But actually giving a refund is really different than
7 what a true counterfeiter -- intentional counterfeiter would
8 do. And she also told him to send it to the publishers.
9 Obviously that's not something else that a real counterfeiter
10 would do.

11 Another email is from Phil Smyres: I would like to
12 reiterate that we do not buy unauthorized copies. I mean how
13 much clearer could he be? Mr. Oppenheim comes up here and he
14 says, I'm going to explain to you what all these emails mean.
15 He comes up here and he very creatively comes up with a story
16 for every single one of these emails. He's like, When he says
17 I reiterate that we do not buy unauthorized copies, he's really
18 saying, Be more secretive; send them to me in some sort of
19 secret channel; send me way more counterfeit copies.

20 That's not true. There's no evidence of that. The
21 creativity of the argument doesn't make it so.

22 Then Phil Smyres says again in 2008: You need to
23 speak to the company you are buying these books from and tell
24 them this is very serious. You should ask them to refund your
25 money and pay for all shipping costs.

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Summation - Mr. Bhandari

1 Mr. Smyres obviously doesn't think Ple is a real
2 counterfeiter if he's telling her to speak to her sources.

3 What's the theory of this?

4 In August of 2008, Mr. Smyres was like, I'm going to
5 pretend that I think Ple has legitimate sources, so I'm going
6 to send this email. But that's all he does. That's the only
7 thing he does to cover his tracks is send this email. Of
8 course not. This is what he meant; he thought she had
9 legitimate sources and told her that she should speak to the
10 sources.

11 And then we're in 2011. Mr. Smyres says again, If
12 these books are counterfeit copies, I will need you to send me
13 the money back we paid for these books in April of 2011.
14 Mr. Smyres never wanted to circulate counterfeits. There's no
15 evidence that all of the books from Best Books World were
16 counterfeit. It's what I said before.

17 In order for the plaintiffs to try and make out their
18 case, you have to assume that every single book sold by Best
19 Books World was counterfeit. And that's why any book that they
20 sourced, including the five missing ones, were obviously
21 counterfeit also. But there's no evidence of that.

22 When Best Books World gives the refund and when Best
23 Books World is selling books for a long time and there's no
24 counterfeits in any of the ones between 2009 until February of
25 2011, all of those things indicate they had legitimate sources.

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Summation - Mr. Bhandari

1 There were some bad books in there, yes, and that was enough
2 for Mr. Smyres to stop doing business with them.

3 (Continued on next page)

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Summation - Mr. Bhandari

1 MR. BHANDARI: Again, in 2011, Mr. Smyres said, you
2 should check with your supplier where they were sourced. Ask
3 them to produce an invoice from the publisher. These are not
4 e-mails from someone who thinks he is dealing with a real
5 legitimate counterfeiter. Whatever it may look like years
6 later, when you look at all the e-mails, that was obviously not
7 his intent, but this was enough for him to stop doing business
8 with them in 2011. Again, there is no evidence that all the
9 books were counterfeit.

10 That brings us to the Blackerbys. The publisher said
11 there is so many things you can do for due diligence.
12 Mr. Smyres didn't even meet with Ple. Mr. Smyres met the
13 Blackerbys face to face before doing business with them. The
14 Blackerbys are based in Alabama, not outside the United States.
15 They sold over a hundred million dollars of books to Follett
16 each year and the vast majority of those books were obviously
17 authentic. Mr. Oppenheim doesn't dispute that. He said, oh,
18 he was just bragging. That shouldn't have been enough. He
19 doesn't say that the books were never sold.

20 Book Dog Books independently researched the business
21 by comparing their pricing to Follett's, which also seemed to
22 confirm they were selling to Follett. The defendants had no
23 idea that the publishers had sued the Blackerbys. After the
24 first allegation that the Blackerbys had sold a questionable
25 book, the defendants limited their purchases from them and

1 ceased purchasing from them a few months later when they were
2 not convinced that they were getting all authentic books.
3 That's what you are supposed to do. And yet the Blackerbys are
4 one of the two pillars of the plaintiffs' case here. The
5 Blackerbys did not sell 100 percent counterfeit books. There
6 is no way. They couldn't have been selling that volume to
7 Follett if that was the case.

8 So the plaintiffs come up with a really creative
9 argument. They said, well, remember when Mr. Smyres sent books
10 back to Ple. When he rejected the books and he said, give me a
11 refund, that is distribution. That would be like if you get
12 something broken from Amazon or something that you think is
13 counterfeit from Amazon and you send it back for a refund,
14 supposedly you distributed a counterfeit. You are not going to
15 hear any jury instruction that says rejecting books constitutes
16 the distribution.

17 And the importation of books, what you saw was that
18 there is no evidence whatsoever that Mr. Smyres or Book Dog
19 imported any books from Best Books World. When we looked at
20 that PIERS report, if you recall, there was some back and
21 forth. We were like, we have never seen this before. What is
22 this? We have to be able to look into it. And then Mr. Essig
23 got up on the stand and he said, out of all the books that I
24 see in this PIERS report, they were sold to the defendants by
25 sellers other than Best Books World. So they have literally

1 zero evidence for the importation of books.

2 As you heard Josh Frenette testify, that when Best
3 Books World sent books to the United States, they did it by Fed
4 Ex. They were the ones who exported it. We never filled out
5 any customs forms. We never imported it. You saw testimony
6 that we had paid some amount for shipping because they were the
7 ones that were sending the books. When people ask you, well,
8 did the defendants import books from Best Books World, the
9 answer is definitely not.

10 That brings us to Mr. Oppenheim's argument at the end
11 of the closing. He said, you know what, there might be some
12 holes here and there in the evidence, you know. We are not
13 going to be able to prove everything of every single thing
14 here, but you can rely on these jury instructions saying that
15 you can draw an adverse inference because there was supposedly
16 the destruction of property and we didn't produce some
17 financial or rental records. He basically is saying, don't
18 trust your eyes on this one. Just because I haven't shown you
19 any evidence and our roadmap is garbage, you should still find
20 against them because there was destruction of evidence.

21 You have seen this. I don't think I can say this any
22 more clearly, and Mr. Mandel said it in his opening or,
23 frankly, Mr. Oppenheim said it in his closing. You heard from
24 Mr. Davenport this morning. Today is the day for you to
25 understand this issue.

1 The destruction of these books was done because
2 Mr. Smyres did not want the books to get back into circulation.
3 It was done on July 1, 2011, before there was a cease and
4 desist letter. It was done to try and make it so that sort of
5 sad event with Noah Davenport, the son of Mark Davenport,
6 stealing books from the barn wouldn't happen. There was no
7 intentional destruction of evidence at any point in this case.
8 And while they say the pictures were done because Mark
9 Davenport wanted to show that he used a bulldozer, the receipt
10 was requested by Mr. Smyres because he wanted proof that these
11 questionable books were being destroyed.

12 It's true, you may draw some sort of adverse inference
13 from the destruction. But why would you? If somebody says to
14 you, shouldn't we just fill in the blanks in the plaintiffs'
15 case by assuming the defendants did something bad but they
16 destroyed those books, you should say absolutely not. They
17 didn't destroy those books to hide evidence or to do anything
18 bad in this case. They did it because they wanted to get rid
19 of counterfeit books, and there wasn't even a cease and desist
20 letter.

21 Similarly, the other instances that supposedly exist
22 of destruction of books, you heard testimony that Mr. Smyres
23 and Mr. Dimm said, do not destroy any Cengage books, do not
24 destroy any Pearson books or Wiley books. There was never any
25 effort to destroy evidence. In fact, we have 5,000 books kept

1 on our quarantine. There is really no reason and no
2 possibility of drawing an inference from these things.

3 That brings us to damages. Listen. As I said before,
4 this case should be an easy one. There is not any proof and
5 they have the burden that we distributed these books and that
6 the books were actually counterfeit. They have not provided
7 evidence. But if you do believe for some small portion of them
8 there is -- you believe that there is evidence and that's how
9 this jury goes, it's my job to tell you what to think about
10 damages now.

11 There are six factors you should consider:
12 Defendants' state of mind, expenses saved and profits earned,
13 revenue lost by publishers, deterrent effect on defendants and
14 third parties, and defendants' cooperation in providing
15 evidence concerning the value of the infringing material, and
16 the conduct and attitude of the parties.

17 Let's start first with the defendants' state of mind.
18 Remember the company culture here. The testimony of every
19 single one of these Book Dog employees was that there is a
20 strong company culture to weed out counterfeits. Remember, we
21 are partners with Amazon, and in that trade-in program there is
22 only a handful of companies that can do that.

23 We are partners with Chegg. You heard from Chegg that
24 they wouldn't do business with a company that they thought was
25 bad, and Chegg is one of the best practices partners that the

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Summation - Mr. Bhandari

1 plaintiffs have talked about.

2 We trained Noram, which is the company that does
3 inspections for Amazon, and we offered to pay the publishers to
4 help protect counterfeits.

5 We obviously have a culture of trying to weed out
6 counterfeits. If there is going to be damages award for some
7 small portion of the books that we were accused of distributing
8 in the case, it should be the smallest possible damages.

9 We are the good guys. We are trying to do everything
10 we can to stop them. You will remember this letter where we
11 said Book Dog is willing to provide the publishers with space
12 in our warehouse alongside BDB's own fraud department so they
13 may jointly determine who, if anyone, is attempting to sell
14 counterfeits.

15 The Chegg spreadsheet we went over before .886 of all
16 of our books that we sent to Chegg were alleged counterfeits.
17 You heard the testimony from Richard Essig and William Sampson
18 that if it's less than 1 percent of books, you can assume that
19 those people are more conscientious and more reliable. That's
20 us. You've seen the numbers. 161 titles out of a million
21 titles sold. 500 to a thousand books out of 14 million books
22 sold .886 percent. Those are the numbers.

23 Expenses saved and profits earned by infringement.
24 That's important. It has to be by the infringement. So in
25 this case you saw that we earned between 2 and \$3 per book. If

1 you determine that we distributed counterfeit copies of any of
2 the titles at issue in this case, we made between two and \$3
3 per book on that. If you wanted to take all of our profits
4 from selling those potential books for whatever the handful of
5 books are that we sold, you would be able to do that. It would
6 end up being something on the very low end. You would probably
7 still have to round it up to hit whatever the statutory minimum
8 is, but you might not even get to \$200 because there are so few
9 books, from their allegations, that we have actually
10 distributed. You would have to do the minimum. But this would
11 be our profits. If you decided to double our profits and say,
12 it's \$4 to \$6 per book, that would still be a tiny amount for
13 the number of titles at issue in this case.

14 Remember, the profits are relevant only if they are
15 earned by the infringement. This is a very, very important
16 jury instruction. You cannot consider our profits generally.
17 Mr. Smyres has got a successful company because he provides a
18 great service for a lot of students. But the only profits that
19 are relevant for your calculation would be the ones earned by
20 the infringement. That's \$2 to \$3 a book for a tiny number of
21 books.

22 And the revenue lost by the publishers as a result of
23 the infringement. As you probably know, there is zero evidence
24 that they lost any revenue because used books are their main
25 competitor and counterfeit books essentially displace other

1 used books. They have not come in here with any numbers on
2 lost revenue.

3 Then we get to the deterrent effect on the defendants
4 and third parties. You heard Mr. Oppenheim talk about this as
5 being potentially the most important factor. Well, think about
6 it. It is a very important factor. What do you want to deter
7 people from doing? What steps could Book Dog Books
8 realistically take that would be any different than what they
9 do now and still be able to sell used books? It's not
10 possible. You can't run a used book company and do more than
11 what we are doing now.

12 That brings me to like their one suggestion. Their
13 suggestion is, people are going to say to you in the jury room,
14 what about those best practices? How come they don't ask for
15 the sources of their information? Let's take that as one. You
16 heard from every person who testified as a textbook distributor
17 that they do not share their sources because that is
18 proprietary information. If people tell Book Dog who their
19 sources are of books, then Book Dog can go directly to those
20 sources to buy them. That's not how the textbook industry
21 works.

22 You also heard that Amazon, the trade-in partner, will
23 not reveal the information about the trade-in books that come
24 in that Book Dog Books is distributing as part of its fulfilled
25 by Amazon program. So what the plaintiffs are really telling

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Summation - Mr. Bhandari

1 you is, Book Dog Books should not be able to do business with
2 Amazon. That literally makes no sense whatsoever. Amazon is
3 obviously a conscientious company that's trying to do
4 everything that it's legally required to do. But according to
5 the plaintiffs, if they don't tell us who all the sellers of
6 the books are in the trade-in program, we can't do business
7 with them.

8 The second thing that doesn't make any sense is that
9 according to the best practices, every single book has to be
10 checked against an exemplar. What's the testimony you remember
11 hearing from every single one of the witnesses? Not even the
12 publishers have exemplars of every print run for every copy.
13 The publishers don't have that. There is literally no possible
14 way that a book seller can have every single copy, an exemplar
15 of every single copy. So the best practices are impossible.

16 That being said, Mr. Oppenheim said, well, for
17 deterrence you can think of their total profits and he said,
18 somewhere between 31 million and 53 million. That's, of
19 course, not true. You remember Mr. Quintero's testimony. The
20 real profits that were earned by Mr. Smyres after taxes was
21 closer to \$18 million.

22 But the truth is, none of those numbers are anywhere,
23 anywhere, anywhere in the ballpark of what the appropriate
24 level of damages would be in this case. When you are making
25 between 2 and \$3 per book, that is the appropriate anchor of

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Summation - Mr. Bhandari

1 what the damages should be, not the profits. And for whatever
2 reason they showed you \$700 million in revenue, totally
3 irrelevant.

4 That brings us to the defendants' cooperation in
5 providing evidence. He didn't even talk about this because he
6 knows, of course, this cuts in our favor. John Garry
7 testified. Defendants never agreed to let plaintiffs audit
8 their inventory. He said that under oath. And then we saw the
9 settlement agreement. Paragraph 8 gives the publishers the
10 ability to inspect the Smyres' parties premises, including any
11 warehouse. He admitted that. And we also heard the publishers
12 never exercised that right once. The e-mail from Mr. Smyres to
13 Bill Sampson where he gave Cengage an open invitation to visit.
14 They were trying to cooperate in every way that they could.

15 Now, one last thing on the deterrence. I just got a
16 nice note which is something I forgot. This is an important
17 point, also. Think about the deterrence. You have to think
18 about what it will do to others. What other company can
19 realistically sell textbooks if every time one of those
20 mosquitoes makes it past your mosquito net, and a counterfeit
21 gets through, which is inevitable, you are betting the entire
22 company that there can be some huge amount of damages that
23 wipes out all of your profits or wipes out double your profits.
24 It would be like playing Russian roulette. You can't ever,
25 ever sell a used book because you can't know with 100 percent

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Summation - Mr. Bhandari

1 certainty whether or not there is any chance it's counterfeit,
2 so it would stop the entire industry. It would be like playing
3 Russian roulette, but instead of just one bullet in there, it
4 would be a thousand bullets a day during the slow season and
5 10,000 bullets a day during the rush season. Think about that.

6 If you find in favor of the publishers, you are
7 sending a message to every other used book seller out there
8 that they are going to be found liable for doing something that
9 there is no possible way to stop. So in this case and without
10 any real proof, if anybody looks at this case closely and says,
11 how on earth did Book Dog actually get found to be liable on
12 any titles where they didn't provide any real proof and their
13 roadmap is garbage? How is that possible? Every seller out
14 there is going to think, we can't be in the used book industry
15 anymore.

16 So that brings us to the conduct and attitude of the
17 parties. The publishers themselves make the counterfeiting
18 problem worse in so many ways. And the reason why, it's their
19 business strategy to sue. They themselves continued to sell
20 new books to Wirat, who printed counterfeit copies of them.
21 You heard them testify about that. The publishers send their
22 digital files to outside printers where they can be leaked.
23 Wiley has no anticounterfeit department whatsoever and nobody
24 was in charge of the issue there and all the other ones are
25 tiny. This is critically important.

1 The publishers don't employ anticounterfeiting
2 technology used in all sorts of other products. Not a single
3 book in this case has one of these Cengage stamps on it that
4 would allow a textbook distributor to know if it's authentic or
5 not. There is no proof tags that they were using at the time
6 that this lawsuit was brought. These anticounterfeiting
7 technologies are so easy for the publishers to do. You see
8 them on baseball hats. You see them on all sorts of products
9 all around the world. They don't do that and they come in here
10 and they say, you can't tell the difference of these books to
11 determine if they are counterfeit or if they are real. They
12 contribute to this problem.

13 The publishers refuse to tell the distributors about
14 the known sources of counterfeits. The publishers don't
15 provide characteristics that can be used to identify
16 counterfeits. And, of course, the publishers use the
17 information provided by distributors to sue them. You heard
18 that testimony by Follett. Follett surrendered a lot of books,
19 tried to cooperate with the publishers, and then Bill Sampson
20 testified that just four weeks before his deposition in
21 September of 2017, the publishers sued Follett.

22 You remember the testimony of Steven Rosenthal. The
23 best practices that they are talking about were created by the
24 plaintiffs in this case. That's why they are impossible. It
25 was the plaintiffs and Oppenheim & Zebrak that put together

1 best practices that no legitimate book seller can confidently
2 adhere to 100 percent of the time.

3 That brings us to the jury charge. This is the exact
4 language you are going to see when it comes to the
5 infringement. There is some allegations about willfulness, but
6 if you determine that the defendants reasonably believed their
7 conduct was permissible or their infringement was only
8 negligent by mistake or by accident, then you should not find
9 that the defendants infringed willfully. That's critically
10 important.

11 I think everyone in this room can agree that if there
12 was a infringement -- again, they haven't provided proof that
13 there was, but if there was for some small number of titles, it
14 happened by mistake or by accident or maybe even negligently,
15 although I bet nobody in this room could really figure out how
16 to avoid a tiny number of counterfeits from going through. But
17 it should not be found willful and it's innocent if the
18 defendants had a good-faith belief that their conduct was
19 innocent and their belief was reasonable under the
20 circumstances.

21 That brings us to the verdict form. This is the first
22 thing I mentioned. You are going to have to answer questions
23 that are provided to you by the Court. There are three
24 questions that you are going to have to answer and they are
25 going to be on page 2, 5, and 16 of the jury form. It's a long

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Summation - Mr. Bhandari

1 jury form because, as I am going to explain to you, you will
2 have to go title by title if you are not able to determine this
3 right off the bat.

4 Question 1. It's about trademark infringement. Which
5 trademarks, if any, have the plaintiffs established by a
6 preponderance of the evidence the defendants infringed? The
7 answer to that is none. Trademarks is relatively easy. You
8 have not heard any real testimony about how the trademarks were
9 infringed. The trademarks are not something that's been talked
10 about by the plaintiffs in any sort of detail. They have not
11 provided you with any evidence that the defendants were trying
12 to use these trademarks.

13 When people buy books, they buy books because of the
14 title. When you are a student in college, do you buy a book
15 because you are like, I wonder who the publisher is. I would
16 love to just buy a Pearson book. No. You buy a book because
17 it's called Strategic Market Management and it doesn't matter
18 what trademark, if it's McGraw-Hill, if it's Pearson or
19 Cengage. It doesn't matter.

20 For copyright infringement, similarly, we have gone
21 through this. You are not going to be able to find any
22 infringement because they have not provided you evidence of two
23 things: One, distribution; and, two, that the actual book
24 itself that was distributed was counterfeit.

25 And that brings us to this breach of contract

1 question. Mr. Oppenheim didn't talk about it very much because
2 he said it was easy. It is easy. The answer is no. The
3 question is, did we assist in the selling or importation of
4 counterfeit books or did we sell or import counterfeit books?

5 Again, if you find that there was no copyright
6 infringement and no trademark infringement, the answer to the
7 breach of contract claim is very easy. The answer is no. Even
8 if you didn't necessarily feel that way, there is no way that
9 you can find that we assisted in the sale of counterfeit books.
10 We did nothing to assist in the sale.

11 There is a word called buying. If buying was the
12 thing that was barred by the contract, they would use that
13 word, you cannot buy books according to this. But because
14 everybody knew, the plaintiffs and the defendants, knew in 2008
15 it's impossible to stop someone from selling you a book that
16 you didn't know was counterfeit or not until it gets to your
17 location, you can't say that you are never going to
18 potentially buy a book that's questionable which you then
19 reject.

20 It's easy for three of these. That's the way that
21 this should go. That's the way that the used book industry
22 will be able to continue on.

23 Now, if you don't find that, if you find for some
24 small number, then you are going to have to check a box that
25 some trademarks were infringed or some copyrights were

1 infringed, and you'll have to go title by title to decide which
2 ones were infringed. That's why when I showed you before,
3 there were 14 books with stickers on them. If you find that
4 they were all counterfeit and they have proven it by a
5 preponderance of the evidence that those were counterfeit, you
6 would end up filling in the table. But you must hit some.
7 There is no argument here whatsoever that it could possibly be
8 all. It's either none or some. Should be none. But there is
9 no chance that it's all. It's the same thing for the
10 counterfeits, for the copyright infringement, and the trademark
11 infringement. You'll have to go work by work to determine
12 that.

13 The publisher's logic is this. The publisher's logic
14 is this. Here is a roadmap that I and my colleagues put
15 together. This is a real roadmap that will make sense to you
16 and that is logical. A seller sends a questionable book.
17 Nothing you can do about that, right. You're a textbook
18 distributor. How are you going to stop someone from sending
19 you a questionable book. You can order books. You can hope
20 they are legitimate because you don't want counterfeits, but
21 someone sends you a questionable book. You discover the book
22 is questionable through your inspection process. You think
23 it's potentially counterfeit.

24 Now, your options are -- obviously, from this point
25 on, you've got five options. You can either sell the book.

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Summation - Mr. Bhandari

1 That's wrong. We can all agree that if a person intentionally
2 sells a counterfeit book, that's wrong. You can destroy the
3 book. You can return the book. You can quarantine the book,
4 just keep it aside and say, we are not going to sell it, but we
5 are not going to destroy it, we are not going to return it. Or
6 you can send the book to the publisher. Those are your five
7 choices.

8 Let's see what happens. Let's see whether or not any
9 of those things would make it so that a textbook distributor
10 would not get sued. On the first one, obviously, there is a
11 lawsuit for infringement, rightfully so. In the second one,
12 there is a lawsuit for destruction of evidence. The third
13 one -- if you sell the book, you get sued for infringement. If
14 you destroy the book, they claim you destroyed evidence. If
15 you return the book, according to their logic, that's an
16 unlawful distribution. You returned a book for a refund. If
17 you quarantine the book, you have got cookie on your face and
18 you must have eaten all the cookies or sold them to others. If
19 you send the books to a publisher, just like Follett did, they
20 will use that against you and they will sue you because they
21 will say, look, you had counterfeit books. You obviously got
22 them. You sent them to us, so must have more in your
23 inventory.

24 There is no way to please the publishers and the
25 plaintiffs in this case. You probably know people like this.

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Summation - Mr. Bhandari

1 There are some people in the world who literally, whatever you
2 say, no matter what you do, they are like, that's not good
3 enough. No. That's not OK. You are like, OK. I tried really
4 hard. I got a 99 percent on this test. I studied all night.
5 They are like, why didn't you get a hundred? OK. Fair enough.
6 You are like, I drove all night to see you. There is terrible
7 traffic, but I wanted to get here. I was just dying to see
8 you. They are like, why didn't you fly here yesterday? No
9 matter what happens, that's who the plaintiffs are in this
10 case.

11 Mr. Mandel said it in his opening statement. He said
12 imagine for a moment that whatever the plaintiffs say that we
13 did, we did the exact opposite. Would we still be here getting
14 sued by them? The answer is yes. If we quarantine the book,
15 they would sue us because we are the cookie monster. If we
16 destroy the book, we are trying to hide evidence. If we return
17 the book, that's an unlawful distribution.

18 What was this case really about? Again, Mr. Mandel
19 told this to you right at the very beginning.

20 You heard from Mr. Rosenthal, their witness, I think.

21 (Video played)

22 "Q. Are there any steps that the defendants can take that you
23 believe would eliminate the possibility of them selling
24 counterfeit books 100 percent?

25 "A. Yes.

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Summation - Mr. Bhandari

1 "Q. What steps would those be?

2 "A. Well, I know that the publishers sell only authentic
3 genuine product, so by extension if all product was purchased
4 directly from the publishers and the publishers only sell
5 genuine authentic product, then the defendants would only sell
6 genuine authentic product."

7 I couldn't say it any more clearly than that. The
8 McGraw-Hill representative told you point blank, there is no
9 way to stop counterfeits from infiltrating the system 100
10 percent.

11 In this case they decided -- because they don't really
12 care one way or the other about 161 titles. They didn't lose
13 any revenues from it. It wasn't particularly important for
14 them for these multibillion dollar companies to recover any
15 money for the 161 titles in this case. So in this case they
16 were just lazy. They decided they weren't going to show you
17 any actual proof of distribution for 116 of these. For the
18 remaining 45, they are like, look at our roadmap. Our roadmap
19 is great. And then the roadmap falls apart because it has a
20 bunch of problems with it and their witnesses basically stand
21 off and say, under oath, I cannot tell you to believe this
22 roadmap. It is not my roadmap. It's the world's roadmap.
23 They were lazy, ladies and gentlemen.

24 And if anybody you knew was in a case that's anything
25 similar to this, you would never believe that this flimsy

1 evidence is one feather heavier than what it needs to be in
2 order for them to meet their preponderance of the evidence
3 standard. They barely have a feather of evidence, let alone
4 enough evidence so that against all of our analysis where we
5 did not distribute these books -- many of these books are not
6 clearly counterfeit. They can't even get close to the point
7 where a feather will make a difference.

8 Ladies and gentlemen, think about the general book
9 industry, think about the deterrence on others. This is going
10 to be a hugely important case.

11 It might seem to you that things were low key in this
12 courtroom. Judge Pauley is very funny. There were times when
13 some of the witnesses were very funny. People cracked jokes
14 from time to time. This case is deadly, deadly serious. Any
15 award, any finding for the publishers saying that there was
16 infringements here will have a terrible effect on Book Dog's
17 business because you know what the publishers are going to do
18 next.

19 They are going to go to Chegg and they are going to
20 say, you are our best practices partner. How can our best
21 practices partner do business with Book Dog Books when Book Dog
22 Books was just found liable for infringement on one title or
23 two titles? It could be innocent infringement. It could be
24 the nonwillful infringement, whatever it is. If you guys make
25 the decision that based on this flimsy evidence that doesn't

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Summation - Mr. Bhandari

1 amount to anything, you are going to find Book Dog liable.
2 Obviously, you are going to make it very hard, if not possible,
3 for Book Dog to stay in business. So the deterrence effect of
4 just a finding of even innocent infringement will make it very
5 difficult for them to continue.

6 THE COURT: Mr. Bhandari, begin to conclude your
7 summation.

8 MR. BHANDARI: I was on the landing part of it.

9 Any finding, any finding at all will be terrible for
10 Book Dog's business. If you were to find them, even on the
11 lowest end of the scale, and you'll see that it's \$200 for
12 innocent infringement or \$750 for nonwillful infringement, even
13 if you were to find them at the lowest level, that is going to
14 be devastating for their business because many other people are
15 going to be threatened by the publishers to not do business
16 with Book Dog.

17 Think about all the other sellers that are out there
18 in this world. They are going to look at this case and they
19 are going to say, Book Dog is the company that trains Noram.
20 Book dog is the company that has all these inspection processes
21 in place.

22 Phil Smyres has been in this business since the 1990s.
23 We possibly can't have better inspection systems than what Book
24 Dog has put into place between 2007 and 2018, and every used
25 book seller is going to have to think, can we stay in this

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1 business or do we have to move on to do something else.

2 And what would the effect of that be? It would mean
3 that basically students aren't going to be able to buy
4 reasonably priced textbooks. The used book market is the
5 threat to the publishers. It's not Book Dog. Book Dog didn't
6 do anything wrong. Book Dog tried its hardest and they made
7 this case about Best Books World and the Blackerbys from 2006
8 to 2011 because they know that they have no evidence, zero
9 evidence that they can point to that will make it so you have
10 to believe beyond a preponderance of the evidence that there
11 was a distribution of 161 books and those books were
12 counterfeit.

13 Ladies and gentlemen of the jury, thank you very, very
14 much for your patience. I know this has been a long trial and
15 I know that in deliberations you guys are going to think very
16 seriously about each of these questions.

17 But I am confident that you guys will come to the
18 right conclusion and you will realize, while this is a business
19 strategy for the plaintiffs to try and slow down the used book
20 industry, this is a critically important case for Book Dog.

21 There should be no finding of infringement in this
22 case, no finding of breach of contract, and I trust that you
23 guys will be able to deliberate and come to the same
24 conclusion. Thank you very much.

25 THE COURT: Members of the jury, we are going to take

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1 another short recess and then we will hear a brief rebuttal
2 from plaintiffs' counsel.

3 Please keep an open mind and come to no conclusions.

4 Please recess the jury.

5 (Jury not present)

6 MR. OPPENHEIM: Your Honor, I have several issues I'd
7 like to raise with the Court. If possible, can we do that
8 after a short break?

9 THE COURT: Sure. We will take five minutes and come
10 back.

11 MR. OPPENHEIM: That will be perfect. Thank you, your
12 Honor.

13 (Recess)

14 THE COURT: Mr. Oppenheim, you want to be heard?

15 MR. OPPENHEIM: Yes, please, your Honor. There are
16 three issues I'd like to raise as a result of Mr. Bhandari's
17 summation.

18 The first is that this Court has repeatedly heard
19 argument on the issue of the Chegg summary, and yesterday this
20 is what you said, your Honor: "I am going to let you read the
21 Singh deposition testimony but I'm telling you right now, you
22 cannot make any percentage argument to the jury in closing
23 based upon that testimony because it's misleading. That will
24 be a line you can't cross."

25 Your Honor, he crossed that line. He put a percentage

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1 number up there, and that needs to be cured. That's No. 1.

2 MR. BHANDARI: May I be heard or should I wait for all
3 three?

4 THE COURT: Go ahead.

5 MR. BHANDARI: Your Honor, first of all, that was
6 based on the Essig testimony, not the Singh testimony. That's
7 obviously a huge difference.

8 Second of all, I previewed this for the Court twice
9 this morning, and the Court never told me not to say that. I
10 made it clear that that is what I was going to say in my
11 closing for that one. I am not comparing it to anyone. I
12 didn't use comparative statistics. I didn't say we were better
13 than anyone else. I said out of the sample of books that they
14 got from our people, this is the percentage of books that they
15 allege were counterfeit. There was never any indication that
16 would not be allowed, and I previewed that twice for the Court
17 this morning, and I obviously would have followed any Court
18 instruction.

19 I think it's clear I didn't do anything wrong on this,
20 but I am not going to presume to speak for the Court.

21 And after Mr. Oppenheim speaks, I won't speak again,
22 unless you tell me to.

23 MR. OPPENHEIM: Your Honor, you couldn't be clearer
24 yesterday about this. What Mr. Bhandari is saying, yeah, you
25 ordered me that way yesterday, but this morning I basically

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1 tried to hint to you or tell you that I was going to violate
2 the order and you didn't tell me that that would be wrong, so
3 I'm OK. That doesn't cut it.

4 THE COURT: It was clear yesterday. I am going to
5 give a curative instruction when the jury comes out that they
6 are to disregard the percentage figure that was referred to in
7 Mr. Bhandari's argument.

8 MR. BHANDARI: Your Honor, it's based on the Essig
9 testimony. It's not Singh's testimony. It was simply he
10 refreshed his recollection that it was 50 of our books were
11 suspect out of 4400. That's totally different. We have got
12 the cites for it which we can pull to you. There is nothing
13 misleading about it, your Honor. I did not violate any court
14 order and there is nothing misleading about what I said.

15 THE COURT: I didn't limit it. I said no percentages
16 based on the Chegg summary.

17 MR. BHANDARI: No, no. You said on the Singh
18 deposition. You said that. That's why this morning I made it
19 clear. I said it twice that I was going to be doing it based
20 on the Essig statement, because I thought that's a close call,
21 your Honor. I thought maybe you meant it more broadly than
22 what you said yesterday, so I said it twice. Mr. Glunt got up
23 and said it was stated in Mr. Essig's testimony. He somewhat
24 unwisely -- he said he refreshed his recollection and that was
25 the basis for us making it.

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1 THE COURT: I said you could bring in the Singh
2 deposition. I also said you can't make percentage arguments in
3 closing. I'm giving a curative instruction.

4 Next.

5 MR. OPPENHEIM: Your Honor, the plaintiffs have not
6 once during this case raised an issue that there is insurance
7 coverage. Defense counsel several times during his closing
8 told the jury that if they return a large award they could be
9 putting this business out of business, and that's inaccurate
10 because there is potentially significant insurance coverage
11 here, so we need to somehow remedy that in the jury's mind.

12 MR. BHANDARI: Your Honor, I said the opposite of
13 that. I said even a negligible award at the lowest end of the
14 spectrum, where there is a finding of innocent infringement or
15 nonwillful infringement, could jeopardize the company because
16 they will be told that they can't do business with other best
17 practices companies. I never talked about the size of the
18 award. I never said a large award would bankrupt us. I never
19 said it would put us out of business. I said even the smallest
20 award, if there is a finding of infringement, would be
21 problematic.

22 MR. OPPENHEIM: Your Honor, I believe if we pull up
23 the transcript, we will find two instances that Mr. Bhandari
24 used the expression, or something to the effect of, put the
25 company out of business. The example that Mr. Bhandari gave,

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1 he did say that as well. But he specifically twice made
2 reference to the fact that an award here could put the
3 defendants out of business. We need to correct that.

4 MR. BHANDARI: I never said there was an inability to
5 pay, your Honor, never.

6 THE COURT: He did not make any reference whatsoever
7 to bankruptcy or anything like that.

8 MR. OPPENHEIM: Isn't that what putting somebody out
9 of business is, your Honor?

10 THE COURT: No. You can be driven out of business
11 because nobody will do business with you anymore because you
12 are tainted. That was part of the argument that Mr. Bhandari
13 made. There will be no references to insurance in the
14 rebuttal.

15 MR. OPPENHEIM: Last issue, your Honor. Mr. Bhandari
16 said that the jury could not consider profits generally, and he
17 said that with respect to that one particular provision of the
18 factors. That is contrary to what we decided this morning was
19 going to be in the jury instructions.

20 So I think in addition to just reading the jury
21 instruction to them, we need to specifically call out for them
22 now that, in fact, that is something that the jury will be
23 permitted to consider.

24 THE COURT: No. I don't think I need to call that out
25 now. I'm glad that I added the sentence in the charge that we

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Rebuttal - Mr. Oppenheim

1 discussed this morning, and you'll have an opportunity in
2 rebuttal to make it clear. He made one reference to it. So I
3 am going to decline to give any curative instruction on that.

4 Let's bring in the jury.

5 (Jury present)

6 THE COURT: Members of the jury, at this time we are
7 going to turn to the rebuttal argument, and I ask you once
8 again to give your undivided attention to Matthew Oppenheim,
9 Esq., as he delivers that closing rebuttal on behalf of the
10 publisher plaintiffs.

11 MR. OPPENHEIM: Thank you, your Honor.

12 Defendants got up here a few moments ago and told you
13 that publishers brought this case because they wanted to put a
14 successful used book seller out of business. Was there any
15 evidence whatsoever that that's what the publishers were doing?
16 There wasn't. There was absolutely none.

17 In fact, if you look at the documents or you think
18 about the documents we saw during the course of this case and
19 the counterfeits at issue, they were new. It's not the used
20 books that are the issue, and I said this in my opening. I
21 said it's not about used books. It's about counterfeit books.

22 The defendants want to distract from what this case is
23 really about. It's not about putting a used book seller out of
24 business. There are plenty of used book sellers that we, the
25 publishers, cooperate with all the time, Follett, MBS. You

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Rebuttal - Mr. Oppenheim

1 heard all these companies over and over. They work with the
2 publishers. They surrender books they think are counterfeit.
3 They send books in when they need to get them tested because
4 they are not sure. There is an ongoing cooperation. This is
5 not about putting used book sellers out of business. This is
6 about dealing with an infection that is horrid in the
7 defendants' business and that infection is counterfeits.

8 Mr. Bhandari said that the defendants have a culture
9 against counterfeits. You've heard two and a half weeks of
10 evidence, and I invite you to give serious consideration of
11 whether you think that's true. Because when I sit back and I
12 look at what we have seen, I don't see that culture.

13 In fact, let me answer one of the questions that Mr.
14 Bhandari posed. He said, what should they do? What should the
15 defendants do? What steps should they take? Let me answer
16 that. Let's start with no more secret accounts, no more false
17 names. Let's not call customers names. Let's not hide what we
18 find with e-mails that say mum's the word. When we have
19 policies and procedures on what to do with counterfeiting,
20 let's abide by it. Even 50 percent of them. They don't abide
21 by any of them, their own policies.

22 How about knowing who they buy from? Why not track
23 the counterfeit sellers that are selling books to you? Keep a
24 log of it. Why don't you stop sending the counterfeits back to
25 the sellers? Why don't you stop buying large quantities of

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1 U.S. edition books overseas cheap? Why don't you do what other
2 distributors do, adopt the best practices or at least cooperate
3 with the publishers? How about that for a list of things of
4 what the defendants should do?

5 Let me turn to that cooperation issue for a moment.
6 Mr. Bhandari said that the defendants have been trying to
7 cooperate and it's the publishers that haven't been
8 cooperating, and he pointed to the contractual provision in the
9 settlement agreement that the publishers could come in and
10 inspect the warehouse.

11 Do you remember that contractual provision had a
12 three-year term? And you remember that it just so happened
13 that the day Follett gave notice to the publishers was exactly
14 that three-year mark. Remember, Follett, the evidence you
15 heard, knew about the counterfeits several months earlier, and
16 they had been talking to the defendants about the counterfeits
17 that the defendants had sold them.

18 But for some reason, we don't know why, Follett didn't
19 tell the publishers about those counterfeits until the exact
20 day that the inspection right expired. Mr. Bhandari says,
21 well, look, they had this right. Yeah. We were denied that
22 right because for some reason we weren't notified until the day
23 that right expired.

24 Mr. Bhandari also talked about defendants' other
25 cooperation. How about cooperation with abiding by court

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1 orders? Because they didn't do that repeatedly and
2 systematically in this case.

3 Mr. Bhandari said, we invited the publishers in to
4 inspect our inventory. We have been through this. They wanted
5 us to inspect their inventory on their terms, which was not to
6 look at the bulk overseas shipments that were coming from Asia.
7 When we talk about cooperation, this is not about the
8 publishers not cooperating. It's about the defendants not
9 cooperating.

10 On that note, the defendants here, they get up and
11 they want you to believe they are the victim. We are these
12 billion dollar companies, and they are a small mom-and-pop shop
13 and look at what we are trying to do. We are trying to drive a
14 used book seller out of business. There is absolutely no
15 evidence of any of that.

16 Yes, these are big companies who employ lots of people
17 and have lots of authors that they pay to do a thing which is a
18 good thing. They create educational and academic materials.
19 That is an important thing and it's something we should
20 support.

21 These four plaintiffs, they have historic foundations.
22 When you hear the history of John Wiley, a company started
23 right in this New York area, they published Edgar Allan Poe.
24 These are companies whose marks and their businesses mean
25 something.

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1 Should we allow somebody to go over to Thailand and
2 import counterfeit copies to the United States and just say,
3 well, that's OK because it's a mosquito in the net and we can't
4 do anything about it? I don't think so.

5 Now, Mr. Bhandari said, the plaintiffs didn't present
6 any evidence that the books were counterfeit. That's very hard
7 to see, he said. Remember, we had four witnesses on this.
8 Dick Jensen was the first one from Cengage. Then there was
9 Diane Peirano, Steve Rosenthal and Ron Tesoro. Their testimony
10 was unequivocal. They had evaluated every one of the books at
11 issue in case, hundred percent certain that everyone one of
12 those books was counterfeit. They gave you demonstrations.
13 Mr. Bhandari is right, they did not go through every book. If
14 we wanted this trial to be another three weeks, we could have
15 done that. I'm guessing none of us wanted that to happen.

16 If the defendants wanted to demonstrate these books
17 weren't counterfeit, put a witness up who has inspected them
18 and have that witness say, I examined these books, I did paper
19 samples. They are not counterfeit. They didn't do that.

20 There were witnesses with impeccable credentials.
21 They showed you what they saw and you saw it yourself. There
22 is no question when you see a plastic zipper headband, that's a
23 counterfeit. When you see a paper which is shiny in
24 reflection, different from what the publishers sell, that's
25 counterfeit. So there was no question about that testimony.

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1 Mr. Bhandari keeps pointing to the exhibits Jensen
2 104, 105, and 106 and says these were legitimate Cengage books
3 and they couldn't tell the difference. First off, these are
4 just not books in the case. We don't know which one may be an
5 exemplar and which may not. And he sprung something on
6 Mr. Jensen and, frankly, I think Mr. Jensen handled it fine.
7 But it really doesn't matter. They are not titles in the case.

8 I heard this garbage roadmap expression so many times.
9 It's literally an encyclopedia of evidence. That's what it is.
10 And Mr. Garry, remember Mr. Garry. Mr. Garry is a decorated
11 former New York police detective, highly credentialed lawyer,
12 long-time publisher executive. He testified in depth about all
13 the types of evidence that were accumulated into that. He
14 testified about the publishers purchased books directly from
15 the defendants. The publishers went to the defendants'
16 customers, some students even, and had them turn over books
17 that were counterfeit and had all the receipts with them.

18 The publishers went to the wholesaler customers and
19 got counterfeits that the wholesalers said came from the
20 defendants. The publishers went downstream, the customers and
21 the wholesalers, but they also went upstream. They said,
22 Tichenor, you were supplying. Let's see what you were
23 supplying. Blackerby, you were supplying. Let's see what you
24 were supplying. Literally, the publishers collected evidence
25 from every single spot, including in the defendants' own

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1 possession.

2 Now, the defendants want you to believe on that front,
3 well, they found the book, they put it in quarantine. That was
4 the only counterfeit copy of that title and they never
5 distributed it. There were some problems with that. Because
6 there is no evidence that that was the only copy, counterfeit
7 copy of that book. This is about titles, not books; titles,
8 not books. We have no idea how many other counterfeit copies
9 they had and they sold. There is no evidence.

10 And, in part, it's because of Matasa. Do you remember
11 Matasa? Matasa is the entity that is owned by a former
12 employee, has no other employees, and Book Dog Books hired to
13 do all of their rentals. But Matasa has no employees and no
14 warehouse and no inventory.

15 So Matasa turns around and hires Book Dog Books back
16 to actually do the work. Do you remember this? This was on
17 the very first day we heard this. We have no idea. Those
18 books that they claim were in quarantine were in their
19 possession. Whether they were sold to Matasa, whether Matasa
20 had rented them out, there is no evidence on any of that. We
21 know that defendants had counterfeit copies of those titles in
22 their possession. We know the defendants bought counterfeit
23 copies in bulk. We know that the number they had in their
24 possession was very limited. And we have no idea what they had
25 rented and sold before.

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Rebuttal - Mr. Oppenheim

1 The defendants say, well, this is a case that the
2 plaintiffs have put forward that is just about the past, 2006
3 to 2011. That couldn't be less true. The defendants have
4 clearly evolved in 10 years. But evolution isn't always a good
5 thing. So what they have evolved to do is to hide better their
6 actions.

7 Now, Mr. Cahill isn't an employee. They took the
8 employee who was dealing with the Blackerbys and they said, you
9 are going to have your own company in Australia and you are
10 going to buy from all these sources in Asia, and you are going
11 to ship those books to us, but we are going to close our eyes
12 as to who is sending them.

13 (Continued on next page)

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Rebuttal - Mr. Oppenheim

1 MR. OPPENHEIM: For all we know, they are still
2 getting books from Best Books World; they are still getting
3 books from the Blackerbys; they are still getting books from
4 Wirat. We have no idea. Because they've created this blind,
5 if you will, so they can't see what's going on. That's
6 happening today.

7 Let's talk about this Amazon program.

8 So they say we tell them they shouldn't do business
9 with Amazon. That's not what we are saying. We are saying
10 when you enter into a program where you're repeatedly getting
11 counterfeits coming through it and you have no ability to check
12 what it is that is being bought and sold in your name, you need
13 to change what you're doing.

14 They have a choice to make. They could participate in
15 the program or not. They've signed up to a program and said,
16 We're fine with you buying and selling books in our name, doing
17 it this way, where we have no oversight whatsoever of those
18 books. Again, they are willing to be totally blind who the
19 books are being bought from, right, and what those books are.

20 Let's talk about buyback for a minute now. Buyback
21 now. Yes, they inspect them, that's great. They have no
22 authentication on their website. Show me a business that you
23 go to now that doesn't have some authentication on their
24 website. If you go to buy anything online, there's some sort
25 of authentication, because that's what happens. That's what

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1 happens in a legitimate environment. They have zero
2 authentication. So they have no idea who's selling them books.
3 And if they do decide to cut off a seller, the seller can just
4 create a new user name and start over again because they don't
5 track IP addresses.

6 We heard great testimony about what they do on the
7 fraud side of the business, tracking IP addresses, doing
8 investigations, using LinkedIn and Facebook and all this stuff.
9 Great. It would be nice if they actually did that on the
10 counterfeit side. They don't.

11 But the worse part of the buyback process is they take
12 the books in. And when they ship them back to the customers,
13 they use this euphemism. Instead of telling the customer the
14 books are counterfeit, they say they do not meet our purchasing
15 standards. So not only are they returning it, but they are not
16 telling the people they are returning the books to, Hey, these
17 are counterfeit. So they are just putting these books back
18 into the stream.

19 And you heard testimony that sometimes these sellers
20 come right back to the same buyback site and try to sell it
21 again. And they've caught them. So their current efforts are
22 totally inadequate.

23 Now, the real proof in the pudding in that is the fact
24 that the publishers have been continuing to find counterfeits,
25 including in the month of March of this year. So they are not

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Rebuttal - Mr. Oppenheim

1 doing what they need to do. The law says you can't do this.
2 And their attitude is, Well, it's just a few mosquitoes in the
3 nets. We don't think that that works.

4 My last issue. I'm getting handed lots of notes. My
5 last issue.

6 So Mr. Bhandari put up this slide talking about the
7 financials of the company. And one of the things he said is
8 that you cannot consider the profits of the company generally;
9 you have to look at it with respect to the infringing activity.

10 You're going to hear the jury instruction from Judge
11 Pauley that's 100 percent wrong. When you are considering the
12 factors that go into a statutory damage award, you can
13 absolutely decide -- consider the profits. And it makes sense.
14 Because let's take Apple Company, Apple Corporation. If Apple
15 Corporation does something wrong and you want to issue an award
16 to deter it -- not that I'm saying Apple would, but let's say
17 you did -- I don't know how many billions of dollars they have
18 in the bank, but if you issued a \$2 million award or a \$10
19 million award against Apple, that's petty cash. You'd need to
20 know how much money they have in the bank in order to have some
21 impact that deters them.

22 It's the same thing here. Mr. Smyres has \$47 million
23 coming his way from the last ten years. You need to know that
24 to decide what an appropriate award is. Should he be able to
25 keep some of that money after he's done what he's done?

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Rebuttal - Mr. Oppenheim

1 So Mr. Bhandari puts up this slide, 2 to \$3 a book.
2 It reminds me of a college course I took as a freshman, a long
3 time ago. But it was how to have fun with statistics and how
4 you could come up with numbers and rejigger things, all kinds
5 of ways to basically say whatever you want.

6 They did a great job on this. We have no idea how
7 many books they are actually selling; we have no idea how many
8 of those books are counterfeit. The most outrageous part of it
9 is because they violated court orders and didn't disclose all
10 of their financial information, we don't know if we even know
11 all of their profits. So they did a great job coming up with
12 this two-to-three-dollar-a-book number, but you don't know what
13 percentage of those sales were counterfeit.

14 In thinking about the numbers, you need to think about
15 the issue of punishment, because it's not just deterrence,
16 though deterrence, I think, is the most important factor. The
17 defendants' behavior is not acceptable. There are simple
18 things that we expect of legitimate businesses, and they are
19 not doing that. And they should be not only deterred, but
20 punished. And we ask that you consider that.

21 I leave you with this thought: This case is not about
22 the defendants claiming that they have been victimized by the
23 publishers; it's about do we want to support the real
24 legitimate intellectual property of the companies in our
25 backyard. Thank you very much.

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1 THE COURT: All right.

2 Members of the jury, we've concluded closing
3 arguments. In a few moments I'm going to deliver my charge to
4 you.

5 But before I do, I want to tell you that during the
6 defendants' closing argument, you heard Mr. Bhandari refer to a
7 percentage of counterfeit books found in Chegg's inventory that
8 allegedly came from Book Dog Books. I'm instructing you to
9 disregard that portion of Mr. Bhandari's argument that
10 referenced that percentage, just that percentage.

11 All right. With that, we're going to take a very
12 short recess. Keep an open mind. Don't come to any
13 conclusions. You haven't heard the most important part of the
14 case yet, my instructions on the law to you.

15 So we're just going to take a few moments and you'll
16 be right back in the courtroom, all right?

17 Please recess the jury.

18 (Jury not present)

19 THE COURT: Any other issues at this moment?

20 MR. OPPENHEIM: Not from plaintiffs, your Honor.

21 MR. BHANDARI: Your Honor, one of the elements that
22 Mr. Oppenheim talked about in his rebuttal just now was that
23 they should consider punishment. And that's not one of the
24 factors for damages. I think that there should be a curative
25 instruction to the jury on that, your Honor. Deterrence -- the

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1 six factors are very clearly laid out and one of them is not
2 punishment.

3 MR. OPPENHEIM: Your Honor, there's Supreme Court case
4 law on the notion that the jury in a statutory damages context
5 can consider punishment. So it is not enumerated as one of the
6 six factors, but it is clearly permissible under the law.

7 THE COURT: I think that the jury can consider
8 anything in deciding what award of statutory damages is
9 appropriate. So I'm going to decline to give any further
10 curative instruction.

11 My clerk will circulate to you, if he hasn't already,
12 a copy of the charge as I'll deliver it, and a copy of the
13 verdict sheet. And literally we're going to bring the jury out
14 in about two minutes, so make it real quick.

15 (Recess)

16 (Jury present)

17 THE COURT: Members of the jury, my charge to you on
18 the law is lengthy and covers many points. You must listen
19 closely as I read the charge to you. I will send one copy of
20 these instructions into the jury room for you to have during
21 your deliberations.

22 We are now approaching the most important part of this
23 case, your deliberations. You've heard all of the evidence in
24 the case, as well as the final arguments of the lawyers for the
25 parties. Before you retire to deliberate, it is my duty to

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1 instruct you as to the law. It is your duty to accept these
2 instructions of law and apply them to the facts as you
3 determine them.

4 Regardless of any opinion that you may have as to what
5 the law may be or ought to be, it's your sworn duty to follow
6 the law as I give it to you. If any attorney has stated a
7 legal principle different from any that I state to you in my
8 instructions, it is my instructions that you must follow. In
9 listening to these instructions now and in reviewing them
10 later, you should not single out any particular instruction as
11 alone stating the law, but you should instead consider my
12 instructions as a whole.

13 Your duty is to decide the fact issues in the case.
14 You are the sole and exclusive judges of the facts. You pass
15 upon the weight of the evidence, you determine the credibility
16 of the witnesses, you resolve such conflicts as there may be in
17 testimony, and you draw whatever reasonable inferences you
18 decide to draw from the facts as you determine them.

19 In determining the facts, you must rely upon your own
20 recollection of the evidence. None of what the lawyers have
21 said in their opening statements, in their closing arguments,
22 or in their objections is evidence. You should bear in mind
23 particularly that a question put to a witness is never
24 evidence; it is only the answer in the context of the question
25 that is evidence. You may not consider any answer that I

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1 directed you to disregard, and I remind you that nothing I have
2 said during the trial or will say during these instructions is
3 evidence. Similarly, the rulings I've made during the trial
4 are not any indication of my views of what your decision should
5 be

6 The evidence before you consists of the answers given
7 by the witnesses, the exhibits that were received in evidence,
8 and any stipulations between the parties and the deposition
9 testimony that was read. Exhibits marked for identification
10 are used as demonstratives, but not received into evidence, may
11 not be considered as evidence. Anything you may have seen or
12 heard about this case outside the courtroom is not evidence and
13 must be disregarded entirely.

14 Now, it is the duty of the attorney for each side to
15 object when the other side offers testimony or other evidence
16 that the attorney believes is not properly admissible. Counsel
17 also have a right and duty to ask the Court to make rulings of
18 law and to request conferences at the sidebar out of the
19 hearing of the jury. You should not harbor any prejudice
20 against any attorney or party because the attorney objected to
21 the admissibility of evidence or asked for a conference out of
22 the hearing of the jury or asked me for a ruling on the law.

23 Now, this is a civil case. Accordingly, the
24 plaintiffs have the burden of proving the elements of their
25 claims by a preponderance of the credible evidence. "To

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1 establish by a preponderance of the evidence" simply means that
2 something is more likely so than not so. A preponderance of
3 the evidence means the greater weight of the evidence; it
4 refers to the quality and persuasiveness of the evidence, not
5 to the number of witnesses or documents.

6 If you find that the credible evidence on a given
7 issue is evenly divided between the parties, that it is equally
8 probable that one side is right as it is that the other side is
9 right, then you must decide that issue against the party having
10 this burden of proof. That is because the party bearing this
11 burden must prove more than a simple equality of evidence; the
12 party must prove the element at issue by a preponderance of the
13 evidence. The party's own subjective belief is not sufficient
14 to meet this burden.

15 On the other hand, the party with the burden of proof
16 need prove no more than preponderance. So long as you find
17 that the scales tip, however slightly, in favor of the party
18 with this burden of proof, that what the party claims is more
19 likely true than not true, then that element will have been
20 proved by a preponderance of the evidence. If you conclude
21 that the party bearing the burden of proof has failed to
22 establish its claim by a preponderance of the evidence, you
23 must decide against that party on the issue you're considering.

24 Now, some of you may have heard of proof beyond a
25 reasonable doubt, which is the proper standard of proof in a

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1 criminal trial. That requirement does not apply to a civil
2 case such as this and you should put it out of your minds.

3 Now, there are two types of evidence that you may
4 consider in reaching your verdict: Direct evidence and
5 circumstantial evidence.

6 Direct evidence is evidence that proves a disputed
7 fact directly. For example, where a witness testifies to what
8 he or she saw, heard, or did, that is called direct evidence.

9 Circumstantial evidence is evidence that tends to
10 prove a disputed fact by proof of other facts. To give a
11 simple example, you may remember the story of Robinson Crusoe
12 who was marooned on a deserted island. He spent years thinking
13 he was alone, until one day, as he walked along the beach, he
14 noticed large footprints in the sand. Because his feet were
15 too small to have made them, Robinson concluded that somebody
16 else must have left the footprints, even though he had not seen
17 anyone else, in other words, he had no direct evidence of that
18 fact. But it would be reasonable for him to conclude from the
19 footprints on the beach that, in fact, he was not alone.

20 That's all there is to circumstantial evidence. Using
21 your reason and experience, you infer from established facts
22 the existence or the nonexistence of some other fact.

23 The law makes no distinction between direct and
24 circumstantial evidence. Circumstantial evidence is of no less
25 value than direct evidence, and you can consider either or both

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1 and can give them such weight as you conclude is warranted.

2 Now, in their arguments the parties have asked you to
3 infer on the basis of your reason, experience, and common sense
4 from one or more established facts the existence of some other
5 fact. The process of drawing inferences from facts in evidence
6 is not a matter of guesswork or speculation. An inference is a
7 reasonable deduction or logical conclusion which you, the jury,
8 are permitted -- but not required -- to draw from the facts
9 that have been established by either direct or circumstantial
10 evidence. In drawing inferences, you should use your common
11 sense.

12 Now, you've had the opportunity to observe all the
13 witnesses. How do you evaluate the credibility or
14 believability of those witnesses? The answer is that you use
15 your plain common sense. Was the witness candid, frank, and
16 forthright? Or did the witness appear evasive as if he or she
17 was trying to hide something?

18 How much you choose to believe a witness may be
19 influenced by the witness's bias. Does the witness have some
20 incentive, loyalty, or motive that might cause him or her to
21 shade the truth? Or does the witness have some bias,
22 prejudice, or hostility that may have caused the witness,
23 consciously or not, to give you something other than a
24 completely accurate account of the facts?

25 You are not required to accept testimony, even though

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1 the testimony is uncontradicted and the witness's testimony is
2 unchallenged. You may decide, because of the witness's bearing
3 or demeanor or because of the inherent improbability of the
4 testimony or for other reasons that the testimony is not worthy
5 of belief.

6 If you find that a witness willfully testified
7 falsely, that's always a matter of importance that you should
8 weigh carefully. If you find that any witness has lied under
9 oath, you should view the testimony cautiously and weigh it
10 with great care. It is, however, for you to determine how much
11 of the witness's testimony, if any, you wish to believe. Thus,
12 there is no formula by which you can evaluate testimony. You
13 determine for yourselves every day in a multitude of
14 circumstances the reliability of statements made to you by
15 others. You may consider the interest of any witness in the
16 outcome of this case, regardless of who called or questioned
17 the witness.

18 The issue of credibility may -- but need not be --
19 decided in an all-or-nothing fashion. If you find that a
20 witness testified falsely in one part, you still may accept his
21 or her testimony in other parts, or you may disregard all of
22 it. That is a determination entirely for you, the jury.

23 Now, you've also heard testimony from certain
24 witnesses who offered opinions based on acquired learning and
25 experience in a specialized area of knowledge. Such a witness

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1 is permitted to give his opinions or her opinions as to
2 relevant matters in which he or she professes to be
3 knowledgeable and give reasons for his or her opinions. Such
4 testimony is presented to you on the theory that someone who is
5 experienced in the field can assist you in understanding the
6 evidence or in reaching an independent decision on the facts.

7 Your role in judging credibility applies to these
8 witnesses as well. You should consider the witnesses' opinions
9 and give them as much or as little weight as you think they
10 deserve. If you should decide that the opinion is based on
11 insufficient education or experience or on insufficient data or
12 if you should conclude that their trustworthiness or
13 credibility is questionable for any reason or that their
14 opinion is outweighed by other evidence in the case, then you
15 may disregard the witness's opinion entirely or in part.

16 On the other hand, if you find the witness's opinion
17 is based on sufficient data, education, or experience, and the
18 other evidence does not give you reason to doubt the expert
19 witness's conclusions, you'd be justified in relying on his or
20 her testimony.

21 Now, you've heard evidence that at some earlier time
22 witnesses have said or done something or failed to say or do
23 something which counsel argues is inconsistent with the
24 witness's trial testimony. Evidence of a prior inconsistent
25 statement is not to be considered by you as affirmative

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1 evidence in determining the facts. Evidence of a prior
2 inconsistent statement was placed before you for the more
3 limited purpose of helping you decide whether to believe the
4 trial testimony of the witness who contradicted a prior
5 statement.

6 If you find that the witness made an earlier statement
7 that conflicts with the witness's trial testimony, you may
8 consider that fact in deciding how much of the witness's trial
9 testimony, if any, to believe. In making this determination,
10 you may consider whether the witness purposely made a false
11 statement or whether it was an innocent mistake; whether the
12 inconsistency concerns an important fact or whether it had to
13 do with a small detail; whether the witness had an explanation
14 for the inconsistency; and whether that explanation appealed to
15 your common sense. It is exclusively your duty, based upon all
16 of the evidence and your own good judgment, to determine
17 whether the prior statement was inconsistent and, if so, how
18 much, if any, weight to give to the inconsistent statement in
19 determining whether to believe all or part of the witness's
20 testimony.

21 Now, you may have heard evidence during the trial that
22 witnesses have discussed the facts of the case and their
23 testimony with the lawyers before the witnesses appeared in
24 court. Although you may consider that fact when you are
25 evaluating a witness's credibility, I should tell you that

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1 there is nothing either unusual or improper about a witness
2 meeting with lawyers before testifying so that the witness can
3 be aware of the subjects he or she will be questioned about,
4 focus on those subjects, and have the opportunity to review the
5 relevant exhibits before being questioned about them. Such
6 consultation helps conserve your time and the Court's time. In
7 fact, it would be unusual for a lawyer to call a witness
8 without such consultation. Again, the weight you give to the
9 fact or the nature of the witness's preparation for his or her
10 testimony and what inferences you draw from such preparation
11 are matters completely within your discretion.

12 In determining what weight you'll attach to a
13 witness's testimony, you should consider the interest or lack
14 of interest that a witness has in the outcome of the case.
15 That means that in evaluating the credibility of the witness,
16 you should take into account any evidence that such witness may
17 benefit in some way from the outcome of the case. Such
18 interest in the outcome creates a motive to testify falsely and
19 may sway a witness to testify in a way that advances his or her
20 own interests. A witness who is interested in the outcome of a
21 case is not necessarily unworthy of belief, but the interest of
22 a witness is a factor or possible motive that you may consider
23 in determining the weight and credibility to be given to his or
24 her testimony.

25 Before leaving this subject, I wish to emphasize that

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1 merely because a witness has an interest in the outcome of this
2 litigation, this does not render him or her unworthy of your
3 belief. You may, however, consider this interest as one factor
4 among others in determining what weight and credibility to
5 attach to his or her testimony.

6 Now, some of the exhibits in this case are charts and
7 summaries. These charts and summaries were admitted merely as
8 summaries of voluminous documents. You may use those charts
9 and summaries as evidence, even though the underlying documents
10 and records have not been admitted into evidence. You are
11 entitled to consider the charts and summaries if you find that
12 they assist you in analyzing and understanding the evidence.
13 However, you've also heard the parties challenge the accuracy
14 of those charts and summaries. You must decide how much
15 weight, if any, you will give to them. In making that
16 decision, you should consider the testimony you heard about the
17 way in which those charts and summaries were prepared.

18 Some exhibits in this case were redacted. "Redacted"
19 means that part of the document was taken out. You are to
20 focus on those portions of exhibits that have been admitted
21 into evidence. You should not consider any reason why parts of
22 exhibits were deleted or redacted.

23 Now, this trial combined two cases that the plaintiffs
24 brought against the defendants. The first, which I will refer
25 to as *Book Dog Books I*, was filed on February 4, 2013. The

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1 second, which I will refer to as *Book Dog Books II*, was filed
2 on September 12, 2016. You will be provided with a chart
3 showing the titles at issue in *Book Dog Books I* and the titles
4 at issue in *Book Dog Books II*.

5 Now, let me turn to the substantive claims in this
6 case.

7 Plaintiffs bring three claims in this litigation:
8 Trademark infringement, copyright infringement, and breach of
9 contract.

10 The first claim that I will instruct you on is
11 trademark infringement.

12 You must decide if defendants are liable for
13 infringing trademarks belonging to plaintiffs and, if so, how
14 many trademarks defendants infringed. This must be determined
15 individually on a trademark-by-trademark basis.

16 Plaintiffs allege that by distributing textbooks
17 bearing unauthorized reproductions of their trademarks,
18 defendants infringed ten of plaintiffs' trademarks. Defendants
19 deny infringing these trademarks.

20 A trademark, sometimes referred to as a mark, is a
21 word, name, symbol, or device, or any combination of these
22 items, that indicates the source of goods. The main function
23 of a trademark is to identify and distinguish goods or services
24 as the product of a particular manufacturer or merchant and to
25 protect its goodwill. The owner of a trademark has the right

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1 to exclude others from using that trademark or a similar mark
2 that is likely to cause confusion in the marketplace.

3 In order to establish trademark infringement,
4 plaintiffs must prove three elements:

5 First, one of the plaintiffs is the owner or exclusive
6 licensee of a valid trademark at issue.

7 Two, defendants used, without plaintiffs' consent, a
8 reproduction, copy, or colorable imitation of plaintiffs' mark.

9 Three, defendants used the mark in commerce in
10 connection with the sale, offering for sale, distribution, or
11 advertising of goods or services.

12 For purposes of determining whether defendants
13 infringed one or more of plaintiffs' trademarks, you are not to
14 consider whether defendants intended to infringe that
15 trademark. An unintentional infringement is an infringement
16 nonetheless. If you find that plaintiffs did not prove each of
17 these elements by a preponderance of the evidence, then you
18 must find for the defendants. If, on the other hand, you find
19 that plaintiffs proved each of these elements by a
20 preponderance of the evidence, you must find for the
21 plaintiffs.

22 Now, a certificate of registration issued by the
23 United States Patent and Trademark Office creates a presumption
24 that the trademark is valid and owned by the holder of the
25 certificate. This means that for each trademark for which

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1 plaintiffs have presented a certificate listing a plaintiff as
2 the trademark holder, you must find that that plaintiff owns
3 that trademark and that the trademark is valid, unless
4 defendants have proven by a preponderance of the evidence that
5 such trademark is not valid or is not, in fact, owned by one of
6 the plaintiffs.

7 Additionally, if plaintiffs present a registration
8 certificate listing a person or entity from which a plaintiff
9 has obtained ownership through an exclusive license, transfer,
10 or assignment of rights, or by operation of law, you must find
11 that that plaintiff is the trademark owner and that the
12 trademark is valid, unless defendants have proved by a
13 preponderance of the evidence that the trademark is not valid
14 or that the plaintiff does not, in fact, own the trademark.

15 Let me turn to copyright infringement.

16 Plaintiffs' second claim is for copyright
17 infringement. You must determine whether defendants are liable
18 for infringing copyrights belonging to plaintiffs and, if so,
19 how many. This must be determined individually on a
20 copyright-by-copyright basis.

21 Plaintiffs contend that defendants are liable for the
22 infringement of 142 of plaintiffs' copyrights as a result of
23 defendants' distributing unauthorized copies of those titles.
24 Defendants deny infringing any of plaintiffs' copyrights.

25 A copyright is a kind of legal protection extended to

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1 an author of an original work against the unauthorized
2 appropriation of that work by others. In order to establish
3 copyright infringement, plaintiffs must prove two elements:

4 First, one of the plaintiffs is the owner or exclusive
5 licensee of a valid copyright for the title at issue.

6 And second, defendants violated one or more of
7 plaintiffs' exclusive rights to the copyright.

8 As relevant to this trial, one of the rights held by a
9 copyright holder is the exclusive right to copy the title and
10 to distribute copies of the copyrighted title to the public and
11 to license others to do so as well. The right to distribute a
12 copyright is violated by someone other than the copyright
13 holder importing, selling, renting, or otherwise transferring
14 ownership of an unauthorized copy of a title to another person
15 or entity. For purposes of determining whether the defendants
16 infringed one or more of plaintiffs' copyrights, you are not to
17 consider whether defendants intended to infringe that
18 copyright. An unintentional infringement is an infringement
19 nonetheless.

20 If you find that plaintiffs did not prove each of
21 these elements by a preponderance of the evidence, then you
22 must find for the defendants. If, on the other hand, you find
23 that plaintiffs have proven each of these elements by a
24 preponderance of the evidence, then you must find for the
25 plaintiffs.

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1 Now, when a copyright is registered with the United
2 States Copyright Office, the person or entity listed as a
3 claimant on the copyright registration is presumed the owner of
4 the copyright. This claimant may be the author of the title,
5 but it can also be any person or entity to whom the author
6 assigned, sold, or otherwise transferred the copyright prior to
7 filing the registration. The owner may also be a person or
8 entity to whom a copyright claimant transferred the copyright
9 to after registration.

10 Here, plaintiffs may prove that they own a copyrighted
11 title in three ways:

12 First, by submission of a certificate of registration
13 listing a plaintiff as the claimant of the copyright.

14 Second, by demonstrating that a plaintiff is the
15 recipient of a valid transfer or assignment of ownership of the
16 copyright.

17 Or third, by demonstrating that a plaintiff is the
18 holder of the exclusive right to the title by virtue of a
19 license or other agreement.

20 A transfer of copyright ownership may take place in
21 various ways, including by means of a conveyance or by
22 operation of law, such as through a corporate merger or
23 acquisition or through a licensing agreement. This can be
24 shown through an instrument of conveyance or a note or a
25 memorandum of the transfer. Such an instrument of conveyance,

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1 note, or memorandum of transfer is not valid unless it is in
2 writing and signed by the owner of the rights conveyed or the
3 owner's duly authorized agent. If the right transferred --
4 excuse me. If the right granted, transferred, or licensed by
5 the copyright owner is valid, the grantee, transferee, or
6 licensee becomes the owner of that particular right, meaning no
7 one else can have that right.

8 Now, for certain titles in this case, it's already
9 settled and conclusive that plaintiffs own or exclusively
10 control those titles' copyrights and you are not to
11 second-guess that fact. Those titles are on a list that will
12 be provided to you.

13 For the rest of the titles, plaintiffs have provided a
14 certificate of registration for that title's copyright. This
15 certificate of registration is known as *prima facie* evidence of
16 plaintiffs' ownership of the copyright. That means it is
17 considered proof on its face or, in other words, that once
18 plaintiffs provide a certificate of registration listing it as
19 the copyright claimant, they have satisfied their burden of
20 proof to show that one of the plaintiffs own that copyright.

21 Accordingly, for each title that plaintiffs have
22 presented a certificate of registration listing one of the
23 plaintiffs as the claimant, you must find that that plaintiff
24 owns that title, unless defendants prove by a preponderance of
25 the evidence that the certificate of registration is not valid

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1 or that a plaintiff does not, in fact, own such title.

2 For some of the titles submitted, a certificate of
3 registration listing someone other than a plaintiff as a
4 claimant. If plaintiffs prove by a preponderance of the
5 evidence that a plaintiff obtained ownership of that title
6 through an exclusive license, transfer, or assignment of rights
7 from the claimant listed on that certificate of registration,
8 then you must find that that plaintiff owns that title.

9 For some of the titles at issue, defendants assert
10 that plaintiffs cannot establish ownership of the copyright,
11 nor that they were granted an exclusive license, transfer, or
12 assignment of rights by the copyright's owner. If plaintiffs
13 fail to establish this for a given title, then they have not
14 established an essential element of their claim for that title
15 and you must find in favor of defendants for plaintiffs'
16 copyright claim for that title.

17 Finally, plaintiffs' third claim is that defendants
18 are liable for breach of contract.

19 A contract is a legally binding promise. In 2008,
20 plaintiffs entered into a settlement agreement with defendants
21 Book Dog Books, LLC and Philip Smyres. That settlement
22 agreement settled previous claims that plaintiffs brought
23 against defendants regarding copyright infringement. This
24 Court already determined that this settlement agreement is a
25 legally binding contract. For purposes of this trial, that

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1 determination is conclusive and you are not to second-guess it.

2 The only remaining issue for you to decide concerns
3 one provision of that settlement agreement. That provision
4 required defendants to "cease all sales and importation into
5 the United States of any pirated editions of the publishers'
6 textbooks," and to "not assist any other individual or entity
7 to sell or import pirated editions... in the United States."

8 The phrase "the publishers" refers to the plaintiffs
9 in this litigation. You must determine if defendants violated
10 either element of that provision of the parties' settlement
11 agreement. If you find that plaintiffs proved by a
12 preponderance of the evidence that defendants violated that
13 provision, then you must find defendants liable for breach of
14 contract.

15 Now, if you determine that plaintiffs have proven one
16 or more of their trademark or copyright claims, then you will
17 have to determine what amount of damages to award plaintiffs.
18 You should not interpret the fact that I'm giving you
19 instructions about damages now as an indication that I believe
20 that plaintiffs should receive damages. It is your task -- and
21 yours alone -- to determine whether plaintiffs should prevail
22 on their claims. In other words, you should only reach the
23 issue of what damages are appropriate if you decide that the
24 plaintiffs have proven one or more of their claims.

25 The law permits me to charge you on damages now so

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1 that in the event you decide that plaintiffs have prevailed on
2 one or more of their claims and you reach the issue of damages,
3 you will not have to file back into the courtroom and listen to
4 my charges on damages.

5 So let me turn to statutory damages for trademark
6 infringement.

7 If you determine that defendants are liable for
8 trademark infringement, you must determine what amount of
9 damages to award plaintiffs.

10 Plaintiffs have chosen to recover statutory damages
11 for their trademark infringement claims. Federal trademark law
12 allows a party to elect to recover statutory damages instead of
13 having to prove actual monetary damages. You should,
14 therefore, award statutory damages whether or not there is
15 evidence of actual damages suffered by plaintiffs and whether
16 or not you believe plaintiffs suffered actual damages. You
17 must make one award of statutory damages for each trademark
18 that plaintiffs proved defendants infringed. This is true no
19 matter how many copies were made or how widely they were
20 distributed or how many of the defendants participated in the
21 infringement. Those factors are irrelevant to your
22 consideration

23 The general purposes of statutory damages are to, one,
24 compensate the owner of the trademark; two, penalize the
25 infringer; and three, deter future infringement.

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1 You have broad discretion in determining the amount of
2 statutory damages that you find to be just, based on the
3 evidence presented. In deciding what amount is just, you
4 should consider various factors, including, one, the
5 defendants' state of mind; two, the profits that defendants
6 earned and expenses that they saved in connection with the
7 infringement; three, the revenue lost by plaintiffs in
8 connection with the infringement; four, the deterrent effect of
9 the award, both on defendants and others; five, defendants'
10 cooperation in providing evidence concerning the value of the
11 infringing material; and six, the conduct and attitude of the
12 parties.

13 In considering what amount would have a deterrent
14 effect, you may also consider defendants' total profits and the
15 effect the award may have on other sellers in the marketplace.
16 For each trademark that plaintiffs prove defendants infringed,
17 you must award statutory damages between 1,000 and \$200,000.
18 However, if plaintiffs prove that defendants' infringement of
19 that trademark was willful, then you may -- but are not
20 required -- to increase the statutory damage award to \$2
21 million per trademark infringed.

22 Therefore, if you find that defendants infringed one
23 or more of plaintiffs' trademarks, you will be required to
24 characterize the nature of that infringement as either willful
25 or not willful. It is plaintiffs' burden to prove by a

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1 preponderance of the evidence that an infringement by
2 defendants was willful.

3 Infringement is willful if the defendants had actual
4 knowledge that their actions infringed plaintiffs' trademark or
5 acted with reckless disregard to or willful blindness to that
6 possibility. "Reckless disregard" means that the infringer
7 behaved recklessly in ignoring the possibility that its acts
8 could constitute infringement or in disregarding the rights of
9 the trademark owners. "Willful blindness" means the defendants
10 were aware of a high probability that their activities
11 constituted infringement and consciously avoided confirming
12 that fact.

13 In other words, defendants' infringement need not have
14 been intentional for you to find that it was willful. You may
15 infer defendants' state of mind, including reckless disregard
16 or willful blindness, from their overall course of conduct. If
17 you determine that defendants reasonably believed their conduct
18 was permissible or that their infringement was only negligent
19 by mistake or by accident, then you should not find that
20 defendants infringed willfully.

21 Now let me turn to statutory damages for copyright
22 infringement.

23 If you determine that defendants are liable for
24 copyright infringement, you must determine what damages to
25 award plaintiffs.

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1 Plaintiffs have chosen to recover statutory damages
2 for copyright infringement. Federal copyright law allows
3 plaintiffs to elect to recover statutory damages instead of
4 having to prove actual monetary damages. You should therefore
5 award statutory damages whether or not there is evidence of
6 actual damages suffered by plaintiffs and whether or not you
7 believe plaintiffs suffered actual damages. You must make one
8 award of statutory damages for each copyright that plaintiffs
9 proved defendants infringed. This is true no matter how many
10 copies were made or how widely they were distributed or how
11 many of the defendants participated in the infringement. Those
12 factors are irrelevant to your consideration.

13 Now, here again the general purpose of statutory
14 damages are to, one, compensate the owner of the copyright;
15 two, penalize the infringer; and three, deter future
16 infringement. You have broad discretion in determining the
17 amount of statutory damages that you find to be just, based on
18 the evidence presented. In deciding what amount is just, you
19 may consider all of the facts and circumstances and, in
20 particular, any notice that defendants had of plaintiffs'
21 copyrights.

22 You may also consider the following factors:

23 One, defendants' state of mind; two, the profits
24 earned and expenses saved by defendants in connection with the
25 infringement; three, the revenue lost by plaintiffs as a result

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1 of defendants' infringement; four, the deterrent effect of the
2 award both on defendants and others; five, the defendants'
3 cooperation in providing evidence concerning the value of the
4 infringing material; and six, the conduct and attitude of the
5 parties. Here again, in considering what amount would have a
6 deterrent effect, you may also consider defendants' total
7 profits and the effect the award may have on other sellers in
8 the marketplace.

9 For each copyright that plaintiffs prove defendants
10 infringed, you must award statutory damages between 750 and
11 \$30,000. However, that range can be adjusted up or down
12 depending on whether the infringement was willful or innocent.
13 If plaintiffs prove that defendants' infringement was willful,
14 then you may -- but are not required to -- increase the
15 statutory damage award up to \$150,000 per copyright infringed.
16 If defendants prove that an infringement was innocent, then you
17 may -- but are not required to -- decrease the statutory
18 damages awarded down to \$200 per title.

19 Therefore, if you find that defendants infringed one
20 or more copyrights, you will be required to characterize the
21 nature of that infringement as either willful, innocent, or
22 neither willful nor innocent. It is plaintiffs' burden to
23 prove by a preponderance of the evidence that an infringement
24 by defendants was willful, but it is defendants' burden to
25 prove by a preponderance of the evidence that an infringement

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1 by defendants was innocent.

2 Infringement is willful if the defendants either knew
3 that their actions infringed plaintiffs' copyright or acted
4 with reckless disregard to or willful blindness to that
5 possibility. "Reckless disregard" means that the infringer
6 behaved recklessly in ignoring the possibility that its acts
7 could constitute infringement or in disregarding the rights of
8 copyright owners. "Willful blindness" means that defendants
9 were aware of a high probability that their activities
10 constituted infringement and consciously avoided confirming
11 that fact. In other words, defendants' infringement need not
12 have been intentional for you to find that it was willful. You
13 may infer defendants' state of mind, including reckless
14 disregard or willful blindness from their overall course of
15 conduct.

16 If you determine the defendants reasonably believe
17 their conduct was permissible or that their infringement was
18 only negligent by mistake or by accident, then you should not
19 find that the defendants infringed willfully.

20 Infringement is innocent if the defendants were not
21 aware that their actions constituted infringement of the
22 copyright and had no reason to believe that their acts
23 constituted infringement of the copyright. You must find that
24 defendants both, one, had a good-faith belief that their
25 conduct was innocent; and two, that belief was reasonable under

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1 the circumstances.

2 It is defendants' burden to prove by a preponderance
3 of the evidence that a particular infringement was innocent.
4 In making this determination, you may consider defendants'
5 level of sophistication. You may not find that defendants'
6 infringement was innocent if defendants had access to a copy of
7 plaintiffs' textbook displaying a notice of copyright in the
8 correct form and position. A notice of copyright contains
9 three elements: One, either the copyright symbol, which is a
10 "C" in a circle, the word "copyright," or the abbreviation
11 "COPYR"; two, the year of the first publication of the
12 copyrighted title; and three, the name of the copyright owner
13 or a recognizable abbreviation.

14 Now, you must consider each trademark and copyright
15 separately and make a separate liability determination for each
16 of the ten infringement claims and each of the 142 copyright
17 infringement claims. If you determine defendants are liable on
18 any trademark infringement claims or copyright infringement
19 claims, you may only make one award of statutory damages for
20 that title. This is true no matter how many infringing copies
21 may have been sold or how many of the defendants jointly
22 participated in infringing that copyright -- that trademark or
23 copyright.

24 Now, plaintiffs contend that defendants purchased
25 books at prices "too good to be true" for the 140 titles in

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1 *Book Dog Books I*. Please do not consider this argument for the
2 21 titles in *Book Dog Books II*. To the extent that you choose
3 to consider whether the pricing of certain titles at issue was
4 "too good to be true," you may do so only for the 140 titles at
5 issue in *Book Dog Books I*.

6 You've heard evidence that in *Book Dog Books I*
7 defendants destroyed textbooks that had been set aside as
8 potentially counterfeit; and that they failed to maintain
9 records regarding those books. Plaintiffs contend that those
10 actions prevented them from discovering additional evidence of
11 defendants' infringing activity. During your deliberations,
12 you may consider defendants' document destruction practices and
13 their failure to retain records regarding those books in
14 determining whether defendants infringed plaintiffs' trademarks
15 and copyrights for the titles in *Book Dog Books I*.

16 You've heard evidence that in the course of litigating
17 this case, defendants failed to comply with court orders
18 requiring them to identify all of the entities and businesses
19 through which they conduct business, and to provide certain
20 financial and rental information regarding their companies.
21 Those failures deprived plaintiffs of the ability to present
22 certain evidence regarding defendants' business and finances,
23 possibly including the full extent of defendants' profits and
24 sales. Given defendants' violation of those orders, you may
25 infer that the evidence that defendants failed to provide would

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1 have been unfavorable to defendants, and that the evidence
2 would have shown a higher level of profits than demonstrated by
3 the records that defendants produced.

4 Now, shortly you'll go into the jury room to begin
5 your deliberations. In order to prevail on their claims,
6 plaintiffs must sustain their burden of proof as I've explained
7 it to you. If you find that plaintiffs succeeded, you should
8 return a verdict in their favor. If you find plaintiffs
9 failed, you should return a verdict in favor of the defendants.

10 As you deliberate, please listen to the opinions of
11 your fellow jurors and ask for an opportunity to express your
12 own views. Every juror should be heard; no one juror should
13 hold center stage in the jury room, and no one juror should
14 control or monopolize the deliberations.

15 If, after listening to your fellow jurors, and if,
16 after stating your own view, you become convinced that your
17 view is wrong, do not hesitate to change your view. On the
18 other hand, do not surrender your honest convictions and
19 beliefs solely because of the opinions of your fellow jurors or
20 because you are outnumbered. Your final vote must reflect your
21 conscientious belief as to how the issues should be decided.
22 Your duty is to decide the issues fairly and impartially and to
23 see that justice is done.

24 Remember at all times you are not partisans, you are
25 judges, judges of the facts. Your sole interests are to seek

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1 the truth from the evidence in this case and determine whether
2 plaintiffs have proven their claims by a preponderance of the
3 evidence.

4 Your verdict must be unanimous. Each of you must
5 decide this case for yourself. If at any time you are not in
6 agreement, you are instructed that you are not to reveal the
7 standing of the jurors -- that is, the split of the vote -- to
8 anyone, including the Court, at any time during your
9 deliberations.

10 (Continued on next page)

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1 THE COURT: Finally, I say this not because I think
2 it's necessary, but because it's the custom in this courthouse
3 to say this. You should treat each other with courtesy and
4 respect during your deliberations.

5 Your first duty in the jury room is to select one
6 member of the jury as your foreperson. That foreperson has no
7 greater voice or authority than any other juror but is the
8 person who will communicate with the Court when questions
9 arise. If during your deliberations you want to see any of the
10 exhibits, you may request that they be sent to you in the jury
11 room.

12 A list of exhibits received in evidence will be
13 forwarded to you in the jury room along with a copy of my
14 charge. If you want any of the testimony read, that can also
15 be done but will occur here in open court. Your requests for
16 exhibits or testimony, in fact any communications with the
17 Court should be made to me in writing, signed by your
18 foreperson, and give it to the marshal. I will respond to any
19 questions or requests you have as promptly as possible by
20 having you return to the courtroom so that I can address you in
21 person. In any event, do not tell me or anyone else how the
22 jury stands on any issue until after a unanimous verdict is
23 reached.

24 After you have reached a verdict, your foreperson will
25 fill out the jury verdict form that will be given to you,

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1 signed and dated, and advise the marshal outside your door that
2 you are ready to return to the courtroom. I stress that each
3 of you should be in agreement with the verdict which is
4 announced in court. Once the verdict is announced by your
5 foreperson in open court and officially recorded, it cannot
6 ordinarily be revoked.

7 Now, I am going to review with you now the jury
8 verdict form, a copy of which I am going to give to each of you
9 to have in the jury room.

10 Please distribute the verdict form and we will go over
11 it together.

12 Turning to page 2, according to the principles of law
13 as charged by this Court and the facts a you find them, please
14 answer the following questions: I. Trademark infringement.
15 Question 1: Plaintiffs are pursuing trademark infringement
16 claims for 10 trademarks. Those trademarks are listed in table
17 1. Which trademarks, if any, have plaintiffs established by a
18 preponderance of the evidence that defendants infringed? And
19 then there is a box to check, either all, some, or none.

20 Now, the table is on page 4 of this verdict form.

21 Turning back to question 1: If you answered all to
22 question 1, go to question 2. If you answered none to question
23 1, go to Section 2. Section 2 involves copyright infringement.
24 If you answer none, you are done with respect to trademark
25 infringement. If you answer some to question 1, please mark in

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1 the liability column of table 1 the trademarks that you find
2 defendants infringed and then proceed. You would go to table 1
3 on page 4 and mark in the liability column those trademarks
4 that you find infringed, and then you will return to answer
5 question 2 on page 2.

6 Question 2: If you answered all or some to question
7 1, you must decide whether defendants' infringement was willful
8 or not willful. Which trademarks, if any, have plaintiffs
9 established by a preponderance of the evidence that defendants'
10 infringement was willful? Here again, you are given a menu of
11 options. Check only one, either all, some, or none.

12 If you answered all, you will proceed to question 3.
13 If you answered none to question 2, you will also proceed to
14 question 3. If you answered some to question 2, please
15 identify the trademarks that you find defendants willfully
16 infringed by checking the box in the willful follow of table 1.
17 Please identify the trademarks that you find defendants did not
18 willfully infringe by checking the box in the not willful
19 column of table 1 and then proceed to question 3.

20 Question 3: If you answered all or some to question
21 1, you must determine an amount of statutory damages to award
22 plaintiffs for each trademark that you found defendants
23 infringed. If you choose to award the same amount of statutory
24 damages for each trademark infringed, please fill in the amount
25 you award plaintiffs for each trademark infringed on the line

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1 below. If you choose to award different amounts of damages for
2 different trademarks, please identify the amount you award
3 plaintiffs for each trademark that you find defendants
4 infringed in the damages award column of table 1.

5 We then go on to restate the parameters for statutory
6 damages, namely, the amount of statutory damages that you must
7 award plaintiffs for each trademark infringed is as follows:
8 If not willful, you must award damages between a thousand and
9 \$200,000 per trademark infringed. If willful, you must award
10 damages between 1,000 and \$2 million per trademark infringed.
11 Then what amount of statutory damages per trademark infringed
12 do you award plaintiffs. There is a dollar sign and an amount.
13 That is only if you determine that damages are the same amount
14 for all trademarks infringed. Otherwise, you will fill in the
15 amounts on table 1 on page 4.

16 Now we turn to Section 2, copyright infringement.

17 Question 4: Plaintiffs are pursuing copyright
18 infringement claims for 142 titles. Those 142 titles are
19 listed in table 2. Which copyrights, if any, have plaintiffs
20 established by a preponderance of the evidence that defendants
21 infringed? Here again, you have a menu of options: All, some,
22 or none. If you answered all to question 4, go to question 5.
23 If you answered none to question 4, go directly to Section 3.
24 That's because you are then done with copyright infringement
25 and Section 3 involves the contract. If you answered some to

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1 question 4, please mark the copyrights that you find defendants
2 infringed in the liability column of table 2 and then proceed
3 to question 5.

4 Let's go to table 2, and here it's a multipage
5 document. It's longer than it need be, but the reason is that
6 I thought it would be a good idea to put the damage award
7 parameters for willful, innocent, and neither willful nor
8 innocent on each page as you consider each copyright
9 individually.

10 Let's then return to page 5 because if you have
11 decided that some copyright claims have been proven you will
12 have completed some rows on table 2 of the verdict sheet, and
13 then you will return and you will see that you are instructed
14 then to proceed to question 5, which is right below.

15 Question 5: If you answered all or some to question
16 4, you must determine whether defendants' infringement was
17 willful, innocent, or neither willful nor innocent. Please
18 mark below whether you find defendants' copyright infringement
19 was all willful, all innocent, all neither willful nor
20 innocent, or some mix of the above. This is a four-choice
21 menu, if you decide after addressing each claim individually
22 that you wish to respond in that fashion.

23 If you answered all willful, go to question 6. If you
24 answered all innocent, go to question 6. If you answered all
25 neither willful nor innocent, go to question 6. It's only if

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1 you've answered some mix of the above that you'll then return
2 to table 2 and mark the willfulness determination you make for
3 each copyright that you found defendants infringed in the
4 columns marked willful, innocent, and neither willful nor
5 innocent in table 2. And then you will proceed to question 6.

6 Question 6: If you answered all or some to question
7 4, you must determine an amount of statutory damages to award
8 plaintiffs for each copyright that you found defendants
9 infringed. If you choose to award the same amount of statutory
10 damages per copyright infringed, please fill in the number you
11 award plaintiffs for each copyright infringed on the line
12 below. If you choose to award different amounts of damages for
13 different copyrights, please identify the amount you award
14 plaintiffs for each copyright that you found defendants
15 infringed in the damages award column of table 2. Here again,
16 we recite the amount of statutory damages that you must award
17 for plaintiffs for each copyright infringed is as follows:

18 If willful, you must award damages between 750 and
19 \$150,000 per title infringed. If innocent, you must award
20 damages between \$200 and \$30,000 per title infringed. If
21 neither willful nor innocent, you must award damages between
22 750 and \$30,000 per title infringed.

23 And then there is the question: What amount of
24 statutory damages per copyright infringed do you award
25 plaintiffs? There is an amount with a dollar sign and a blank

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Charge

1 per copyright. This is only to be completed if you determine
2 that you are awarding the same amount of damages per copyright.
3 If not, you will proceed to award damages on table 2.

4 Turning to page 16, Section 3, breach of contract.
5 Question 7: Have plaintiffs established by a preponderance of
6 the evidence that defendants are liable for a breach of the
7 2008 settlement agreement? It's a yes or a no answer.

8 With that, the jury's work will be done other than to
9 have the foreperson sign and date the verdict form. I've taken
10 the liberty of putting in the month of April, but you'll have
11 as much time as you need to deliberate in this case.

12 Now, members of the jury, I am going to ask for your
13 patience a few moments before. I need to confer with counsel
14 up at the side bar.

15 (At the side bar)

16 THE COURT: Are there any additional requests to
17 charge or exceptions to the charge?

18 MR. OPPENHEIM: There are no additional requests from
19 the plaintiffs. I think we have to give you the table
20 instructions that we are going to provide to the jury. I don't
21 know that we have given you that yet. We need to do that.

22 THE COURT: You need to get that.

23 MR. OPPENHEIM: Otherwise, no issues, your Honor.

24 THE COURT: Any issues with respect to the verdict
25 form?

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Charge

1 MR. OPPENHEIM: No, your Honor.

2 MR. MANDEL: No additional issues. The Court has
3 ruled already on all of our issues.

4 THE COURT: No additional requests to charge.

5 MR. MANDEL: Correct.

6 THE COURT: No exceptions to the verdict form.

7 MR. MANDEL: Nothing that the Court hasn't already
8 ruled upon.

9 MR. OPPENHEIM: We preserve all of our objections that
10 we previously noted.

11 THE COURT: I am going to let them get started and
12 give them some instructions about how deliberations are to
13 proceed. We will get them into the jury room and then we will
14 bring them out 10 minutes later and send them home to the
15 evening, unless they decide to stay.

16 (In open court)

17 THE COURT: I told you that we were going to get this
18 case in your capable hands this afternoon. I have made it.
19 Part of my job is to keep the trains running on time.

20 Momentarily you are going to go into the jury room.
21 At this time would counsel be seated. I am going to direct my
22 deputy to administer the oath to the marshal.

23 (Court security officer sworn)

24 THE COURT: Members of the jury, I am going to send
25 you into the jury room to begin your deliberations. As I've

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1 told you, we are going to be sending certain documents in to
2 you. It's unlikely that you are going to get those documents
3 before you go home tonight. If you decide you want to stay
4 beyond 5:00, that's up to you. But, otherwise, at 5:00 I am
5 going to bring you back out and give you some instructions and
6 send you home for the evening.

7 Tomorrow I will ask that you return and begin your
8 deliberations at 9:15, and I'll give you further instructions
9 at 5:00. For now, please recess the jury.

10 (At 4:49 p.m., the jury retired to deliberate)

11 THE COURT: It makes sense to let them talk with each
12 other for a few minutes. I suspect that we will just send the
13 documents in to them tomorrow morning. Is there a list of
14 exhibits that have been received into evidence that's been
15 prepared, a joint list?

16 MR. GLUNT: Your Honor, we don't have a joint list.
17 We have our list and we are keeping track. I assume they are,
18 too. I assume the parties can confer on that relatively
19 quickly and come to a quick agreement.

20 MR. OPPENHEIM: I thought we had conferred last night.
21 Your Honor, give us a moment. We will figure this out amongst
22 us.

23 THE COURT: It might make sense actually in this case
24 to have separate lists only because both sides used numbers in
25 their exhibit lists, unless counsel have a better idea.

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1 MR. OPPENHEIM: We will figure it out one way or
2 another. They are all P something or D something.

3 THE COURT: They can all be combined into one list
4 with the plaintiffs' exhibits and then the defendants' exhibits
5 in one list. And I don't want any disputes about how a
6 document is identified in its title, which is why I want you to
7 confer.

8 MR. OPPENHEIM: Very well. We will do that, your
9 Honor.

10 If I may, when the jury ultimately returns some
11 verdict, would the Court entertain offering the jury the
12 opportunity to chat with counsel after they return a verdict?

13 THE COURT: What I generally do is, I'll go into the
14 jury room and greet them and talk to them for a few minutes,
15 and I tell them that they are free to speak with anyone they
16 want so long as they respect the sanctity of jury deliberations
17 and speak only for themselves.

18 I do generally tell them that the lawyers may want to
19 speak to them and it's totally up to them as to whether or not
20 they want to speak with the lawyers. Sometimes I tell them
21 that when I was a trial lawyer I always wanted to talk to the
22 jury after the verdict because I wanted to find out what I did
23 that annoyed them so I would never do it again.

24 I'm going to bring them out in five minutes. Don't go
25 too far.

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1 (Recess pending verdict)

2 THE COURT: Counsel, we are going to bring the jury
3 back in now and send them home.

4 (Jury present)

5 THE COURT: Members of the jury, I am going to send
6 you home for the evening. What I'd like you to do is, you will
7 leave your jury verdict forms in the jury room. Tomorrow
8 morning I will send in one other jury verdict form which the
9 foreperson can use to record any verdict. I'll send a copy of
10 the charge, the tables that we referred to, and a list of
11 exhibits. You'll have those documents in the jury room when
12 you begin your deliberations. I would ask you to endeavor to
13 start your deliberations at 9:15. Please be sure to send us
14 the signal because we keep track of the time that a jury
15 deliberates.

16 If you have any questions or you want any exhibits,
17 any communications with the Court have to be in writing in a
18 note signed by your foreperson and that foreperson can sign
19 their name and put their jury number, 1 to 9, whoever it may
20 be, on the note so we know who the foreperson is.

21 During your deliberations you are not to begin your
22 deliberations until you are all in the jury room all gathered
23 around the table. And if one or more need the restroom or are
24 not at the jury table, you should stop your deliberations until
25 you are all together. That's the very purpose of jury

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1 deliberations.

2 When you are all together tomorrow morning you are now
3 free to talk about the case with each other, but not with
4 anyone else and not separately; only when you are all together
5 in the jury room.

6 Tomorrow we will be available to you to receive notes
7 at any time except between 1 and 2 because we will be taking
8 our lunch between 1 and 2.

9 You will have a decision to make as soon as you arrive
10 in the jury room, what you are going to have for lunch. Fill
11 out the orders so that we can get them to Max and we can see
12 that that is accommodated.

13 It's been a long day. You've been very attentive.
14 The parties really appreciate it. I really appreciate it. We
15 will see you all tomorrow morning at 9:15. Have a great
16 evening. Looks like the sun has come out again. And a safe
17 trip home.

18 Please recess the jurors.

19 (Jury not present)

20 THE COURT: I need counsel to get together and confer
21 and reach agreement tonight so that there are no issues
22 tomorrow regarding the exhibit list, the works in BD1 and BD2,
23 and the copyrights that are stipulated to be a nonissue for the
24 jurors.

25 Is there anything else we need to accomplish this

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1 afternoon?

2 MR. MANDEL: What is the Court's policy with respect
3 to deliberations? Is one lawyer per side sufficient or does
4 the Court want everyone here?

5 THE COURT: As long as there is one attorney here.
6 When I get a note I like to respond immediately. It's not
7 California. Don't leave the courthouse except between 1 and 2
8 because when I get a note, we are going to jump on it and it's
9 going to be resolved.

10 I think you should be here by 9:00 tomorrow morning so
11 that we can get these documents into the jury room, and they
12 will be able to start and make the most productive use of their
13 time.

14 With that, we will wait to see what happens tomorrow
15 morning. I hope that all of you get a good night's sleep for
16 the first time in a couple of weeks.

17 And you need to move out of the well or make some room
18 because I have a criminal case on now. I have to turn my
19 attention to that.

20 Have a good evening, everyone.

21 (Adjourned to April 5, 2018, at 9:00 a.m.)
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23
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PLAINTIFF EXHIBITS

Exhibit No.	Received
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2542966
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DEFENDANT EXHIBITS

Exhibit No.	Received
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287 and 2882857
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